In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-664

JOHN J. McDONOUGH, ET AL.,
PETITIONERS,

v.

TALLULAH MORGAN, ET AL.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JAMES J. SULLIVAN, JR.
FRANCIS J. DiMENTO
PHILIP T. TIERNEY
DiMENTO & SULLIVAN
100 State Street
Boston, Massachusetts 02109
Counsel for the Petitioners

Blanchard Press, Inc., Boston, Mass. — Law Printers

TABLE OF CONTENTS

Table of Citations

Cases

Constitutional Provisions Involved

Statutes

Miscellaneous

In the Supreme Court of the United States

OCTOBER TERM, 1976

No.

JOHN J. McDONOUGH, ET AL.,
PETITIONERS,

v.

TALLULAH MORGAN, ET AL.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners are the School Committee of the City of Boston, Massachusetts, and John J. McDonough, Paul R. Tierney, Kathleen Sullivan, David I. Finnegan and Elvira Palladino as members of said Committee.

Respondents are certified representatives of a class of black parents and children attending the Boston public schools.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on August 17, 1976.

Opinions Below

The opinion of the Court of Appeals for the First Circuit is not reported at this writing, but the slip opinion is reproduced in the separate Appendix, commencing at page 176.

Certain findings of the District Court for the District of Massachusetts were announced from the bench on December 9, 1975, the stenographic transcript of those proceedings being reproduced in the separate Appendix commencing at page 19, along with the Plaintiffs' Motion for Further Relief Concerning South Boston High School (A. 1) to which the District Court made reference in its oral findings.

The District Court's Supplementary Findings and Conclusions on Plaintiffs' Motion Concerning South Boston High School are reported at 409 F. Supp. 1141 (D. Mass. 1975) and are reproduced in the separate Appendix, commencing at page 90.[1]

Judgments Below

The order of the District Court placing South Boston High School under the temporary receivership of the District Court was announced orally on December 9, 1975 (A. 27, 38-41), and was confirmed in the Order Concerning South Boston High School, dated December 9, 1975, which written order is reproduced in the separate Appendix, commencing at page 55.[2]

Related orders of the District Court enjoining all administrative appointments by the petitioners for a four-week

[1] On January 5, 1976, the District Court entered minor Corrections in Supplementary Findings Filed December 16, 1975 (A. 143).

[2] Minor modifications to the December 9, 1975 Order Concerning South Boston High School were entered by the District Court on December 24, 1975 (A. 114), June 22, 1976 (A. 174), and August 13, 1976 (A. 175).

period (A. 40-41, 52-53), and for repairs to, and supplies for, South Boston High School (A. 115, 137-140) are also reproduced in the separate Appendix. Their relation to the subject matter of the instant petition is discussed in the Statement of the Case, *infra*.

The judgment of the Court of Appeals for the First Circuit was entered August 17, 1976, and is reproduced in the separate Appendix at page 191.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C., §1254(1) and Rule 22(3). The judgment of the Court of Appeals was entered on August 17, 1976, and this petition was filed within ninety (90) days of that date.

Questions Presented

May a federal district court, ostensibly in aid of a desegregation plan, wholly remove a public high school from all control of those officials elected to make educational policy?

Assuming receivership is a valid remedy, what are the standards for determining whether that remedy is required in a given case?

Constitutional Provisions Involved

Fourteenth Amendment:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce

any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

This is a school desegregation case in which petitioners, publicly elected[3] officials constituting the School Committee of the City of Boston, seek review of the judgment of the United States Court of Appeals for the First Circuit affirming an order of the United States District Court for the District of Massachusetts which placed a public high school under the receivership of the District Court.

In June, 1974, the District Court for the District of Massachusetts found that the petitioners had intentionally segregated the Boston public schools, *Morgan* v. *Hennigan,* 379 F. Supp. 410 (D. Mass. 1974), which finding was affirmed by the Court of Appeals for the First Circuit, *Morgan* v. *Kerrigan,* 509 F. 2d 580 (1st Cir., 1974), *cert. den.* 421 U.S. 963 (1975).

Having found liability, the District Court ordered into effect for the 1974-1975 school year a student desegregation plan of a limited scope, initially mandated by the Supreme Judicial Court of Massachusetts, *Morgan* v. *Hennigan,* 379 F. Supp. 410, 484 (D. Mass. 1974), which plan became known as "Phase I." (A. 177).

Thereafter, the District Court promulgated a citywide

[3] Mass. St. 1821, c. 110, as amended. As set forth in the City of Boston Code, St. 15, §3 (codifying the various special Acts of the Massachusetts Legislature pertaining to Boston), "[t]he school committee shall have the supervision and direction of the [Boston] public schools. . ."

desegregation plan for the Boston public schools on May 10, 1975, but deferred entry of its Memorandum of Decision and Remedial Orders until June 5, 1975. *Morgan* v. *Kerrigan,* 401 F. Supp. 216 (D. Mass. 1975). This plan, which became known as "Phase II," went into effect in the 1975-1976 school year and was affirmed on appeal to the First Circuit. *Morgan* v. *Kerrigan,* 530 F. 2d 401 (1st Cir., 1976), *cert. den. sub. nom. Morgan* v. *McDonough,* —— U.S. ——, 44 U.S. L.W. 3719 (6/14/76).

On Tuesday, November 18, 1975 (Docket, *Morgan* v. *McDonough,* D. Mass., C.A. 72-911-G) the respondents filed their Motion for Further Relief Concerning South Boston High School (A. 1), which motion contained eighty-nine pages of attachments (in large part, affidavits of fifteen unidentified black students concerning conditions at the school) and which sought, in essence, the closing of that school on the grounds that black students there were being denied a peaceful, desegregated education.

On Wednesday, November 19, 1975, the District Court entered its Notice of Hearing and Procedural Orders (A. 13) which set down the respondents' motion for a hearing at 10:00 a.m. on Friday, November 21, 1975, and mandated that the matter would be heard on affidavits, "except that the court may at the hearing direct that certain affiants and other persons whose attendance is ordered herein give oral testimony." (A. 13). Those persons included the Deputy Superintendent of the Boston public schools, the District Superintendent of the District within which South Boston High School is located, the Headmaster of the school, certain of its faculty, and certain of the student affiants (A. 13-14). The petitioners were further ordered to file, by the hearing date, comprehensive information on the students, faculty and staff at the school (A. 14-15).

On Thursday, November 20, 1975, the petitioners filed an Objection to Notice of Hearing and Procedural Orders and

Motion for Continuance (A. 16) wherein they noted that their counsel had not received the Notice of Hearing until 4:30 p.m. on November 19, 1975 (A. 17), that such short notice denied petitioners a fair trial on the issues, that they were prevented adequate preparation, that the hearing was unduly preferential to the respondents and that, in the interests of due process, a thirty-day continuance was in order (A. 17-18).

Petitioners' motion was denied at the outset of the hearing on Friday, November 21, 1975, and the evidentiary hearings commenced on that date,[4] continued on through

[4] Fairly typical of the fashion in which the hearings were conducted by the District Court is this exchange between counsel and the District Court prior to the luncheon recess on Saturday, November 22, 1976:

> Mr. Tierney [Counsel for Petitioners]: Your Honor, pardon me. Before we recess, could the Court indicate what witness will be called after Mr. Cunningham?
>
> The Court: I don't know. I just don't know. I will try to figure that out.
>
> Have you got something you want to put on after the noon recess?
>
> Mr. Tierney: No, sir. I just would like to know the witness so I could possibly prepare. Are the students going to be called back?
>
> The Court: It depends. When you get to the students, it seems to be cumulative. If there is something more significant, I would like to move on to that, Mr. Van Loon.
>
> Mr. Van Loon [Counsel for Respondents]: At least one of the students, your Honor, begins on Monday on a new job orientation and school programming and I would like, if possible, to have the student heard today.
>
> The Court: Who is that?
>
> Mr. Van Loon: Phyllis Ellison.
>
> The Court: All right. That is a factor.
>
> Mr. Moloney [Counsel for the Mayor]: I was going to share Mr. Tierney's request that the hearing would go more quickly if counsel were able to know about what areas the Court was interested in.
>
> The Court: Well, if you haven't gotten the drift by this time, I am afraid I can't explain it in the next minute or two.
>
> Mr. Moloney: I understand the nature of the hearing now, your Honor, but if we don't know what the witnesses are, there is nothing we can accomplish during lunch to prepare for this afternoon.
>
> The Court: Well, maybe you will enjoy your lunch more. (Transcript, pages 121-122)

[The "drift" of the hearings referred to by the Court was that the hearings were not intended to "fix liability on any particular individuals . . . [but] to determine larger issues . . . connected with whether the desegregation plan . . . is [was] being implemented . . . at South Boston High School." (A. 22)]

Saturday, November 22, Monday, November 24, Tuesday, November 25, Wednesday, November 26 and concluded with argument on Friday, November 28, 1975.

On December 9, 1975, the District Court announced findings from the bench to the effect that the plaintiffs had proven the allegations in their motion (A. 20-27), that black students at South Boston High School were not receiving the peaceful, desegregated education to which they were entitled under the Fourteenth Amendment, and that the Phase II desegregation plan was not being carried out at South Boston High School (A. 27).

In essence, the Court found that black students at South Boston High School had been subjected to discriminatory treatment; that, on occasion, they had been physically attacked by groups of white students; that black students were subjected to verbal abuse; that the situation at the school was part of a pattern of racially discriminatory and hostile conduct which existed even prior to court-ordered desegregation and which was largely the result of efforts of organizations in the South Boston community; and that the school remained racially identifiable because of the presence of school staff and police who were overwhelmingly white (A. 3-12, 20-22, 26-27). The only finding made as to petitioners' conduct was that they had failed to act against persons urging truancy (A. 21-22).

Having stated its findings of facts and conclusions of law, the District Court announced from the bench its order removing South Boston High School from petitioners' control and placing it under the receivership of the Court, man-

dating the transfer of the headmaster[5] and all full-time academic administrative staff from the school and naming the District Superintendent (within whose District the school lies) as temporary receiver (A. 27, 38-41).

Also from the bench on December 9, 1975, the District Court enjoined the petitioners from making any administrative appointments in the Boston shool system, without prior court approval, until January 6, 1976, when the successor school committee would take office.[6] This injunction was based, in part, on the Court's view that the desegregation plan had to be "protect[ed] . . . from being frustrated and defeated by the lame duck School Committee, whose majority . . . I speak of the majority of those members who have done at least everything, in my opinion, that they could *lawfully* do to delay implementation of this desegregation plan." (emphasis added) (A. 43).

On December 16, 1976, the Court entered its Supplementary Findings and Conclusions on Plaintiffs' Motion Concerning South Boston High School (A. 90) wherein the Court noted, *inter alia*, that it had made two visits[7] to the school; that from the two visits it concluded that the services at the school were primarily custodial and only incidentally educational; that the numbers of teachers and

[5] The transfer of the headmaster, Dr. William J. Reid, was based on the District Court's opinion that the changes to be made at the school could not be accomplished under his leadership and on findings critical of the headmaster's performance (A. 107-109, 182-183), despite the Court's expressed view that individual liability was not an issue in the hearings. *Supra*, n. 4.

[6] In November, 1975, there was a municipal election in the City of Boston in which two new members were elected to the five-member School Committee of the City of Boston to take office on January 5, 1976. Thus, at the time of the entry of the order suspending petitioners' appointive powers, two of the members of the School Committee were in a "lame duck" status.

[7] These unannounced visits to the school, on November 26, 1975, during the course of the hearings and again on December 2, 1975 (A. 91) were, in effect, a view taken during litigation conducted without notice to, and opportunity for, counsel to attend.

students at the school were overstated and that the attendance was declining; that the school remained identifiably white; that there was voluntary segregation by the students in that school; that the faculty's attitude had impeded integration; and that the school was surrounded by evidence of racial hostility (A. 90-109).

In the meanwhile, the District Court had entered a written Order Concerning South Boston High School dated December 9, 1975 (A. 55) which order confirmed the placing of South Boston High School under the temporary receivership of the District Court effective December 10, 1975, and the appointment of the District Superintendent as temporary receiver[8] (A. 55). As paraphrased by the Court of Appeals, the District Court's written order of December 9, 1975, directed the

> "receiver to (1) arrange for the transfer of the School's headmaster, full-time academic administrators and football coach without reduction in compensation, benefits or seniority; (2) evaluate the qualifications of all faculty and educational personnel and arrange the transfer and replacement of whomever he sees fit for the purposes of desegregation, without reduction in compensation, benefits or seniority; (3) file a plan with the court for the renovation of the School; (4) try to enroll non-attending students and establish catch-up classes; and (5) make recommendations to the court relative to certain provisions of the plan." (A. 177-178).

Contemporaneously with the entry written "receivership order" the Court entered a written order confirming the

[8] On January 6, 1976, the District Court substituted the defendant Superintendent of Boston public schools as receiver (A. 144-145). On December 24, 1975, the District Court made minor modifications in that part of the receivership order mandating the transfer of administrative staff from the school (A. 114-115).

suspension of the petitioners' appointive powers until January 6, 1976 (the "suspension order"). (A. 53-54).

Petitioners had moved, on December 10, 1975, for a stay of the receivership and suspension orders in both the District Court (A. 58) and the Court of Appeals for the First Circuit (A. 59). On December 15, 1975, the District Court denied the motion from the bench (A. 85), and petitioners renewed their motion to stay in the Court of Appeals (A. 89). By Memorandum and Order entered December 19, 1975, the Court of Appeals declined to stay the orders (A. 110).

On December 24, 1975, the District Court entered a written order mandating repairs and renovations at, and purchase of supplies for, South Boston High School (A. 115), and again on December 31, 1975, entered like "repair orders" from the bench (A. 137-140).

During the pendency of the petitioners' appeal to the First Circuit from the receivership, suspension and repair orders, the District Court, on February 11, 1976, entered a further "repair order" (A. 145), as well as orders on April 7, (A. 166) and June 4, 1976 (A. 172), which directed the petitioners to vote the appointment at South Boston High School of a headmaster and assistant headmasters selected by the Court and the receiver.[9]

On August 17, 1976, the Court of Appeals for the First Circuit affirmed the receivership order, the suspension order, insofar as it was not moot, and the repair orders (A. 176-191).

---

[9] Appeals from these orders of February 11, April 7 and June 4, 1976, are pending before the First Circuit, as well as appeals from orders entered by the District Court on August 20 (A. 192) and September 27, 1976 (A. 194), which directed further votes of the petitioners for the appointment of administrative staff at South Boston High School. *Morgan* v. *McDonough*, 1st Cir., Nos. 76-1121, 76-1239, 76-1426.

Reasons for Granting the Writ

In affirming the District Court's receivership order of December 9, 1975, not only has the Court of Appeals decided important questions of constitutional dimension which should be settled by this Court, but has decided those questions in a way which conflicts with the applicable decisions of this Court.[10]

The important questions of unsettled federal law decided by the Court of Appeals are, of course, first, whether the imposition of a receivership on a public school—operated by locally elected public officials—by a federal district court is within the limits of the latter court's power in a desegregation case; and, secondly, if within the limits of its power, what are the correct standards for making that determination?

It is the position of the petitioners here that the task constitutionally assigned the District Court was only to dismantle a dual school system. Relishing too much its assignment, the Court overzealously designed its own high school and equipped it with wall-to-wall educational policy tightly insulated from the democratic process.

A. *Is Receivership Within the Power of the District Court?*

This Court has recognized that "No fixed or even substantially fixed guidelines can be established as to how far a [desegregation] court can go, but it must be recognized

---

[10] At the outset it should be noted that any discretionary review by this Court, with the potential for reversal which such review carries with it, will not involve the overturning, delaying or rendering uncertain of a wholesale desegregation plan. Such a plan is now in its second year of operation in Boston and this Court has declined to review its merits. *Morgan* v. *McDonough*, ___ U.S. ___, 44 U.S.L.W. 3719 (6/14/76).

that *there are limits.* The objective is to dismantle the dual school system." (emphasis added). *Swann* v. *Charlotte-Mecklenberg Board of Education,* 402 U.S. 1, 28 (1971). The instant petition presents to this Court the opportunity to clarify those limits in the context of a concrete fact situation, which clarification will serve to guide other courts and litigants in other desegregation situations. Should, however, the receivership order of the District Court and its affirmance by the Court of Appeals for the First Circuit be allowed to stand unreviewed, a further aggrandizement of power by the federal courts will have been achieved at the expense of the continuing erosion of local governmental integrity.

The Court of Appeals candidly concedes that "a receivership has been instituted only once in a reported desegregation case, *Turner* v. *Goolsby,* 255 F. Supp. 724 (S.D.Ga. 1966) . . ."[11] (A. 185), and acknowledges that "the court's actions . . . supplanted the supervisory authority of the elected Committee . . ." (A. 188). It went on to reason, however, that

> "judicial desegregation necessarily involves some displacement of decision-making powers, as we have already witnessed in other aspects of this case, e.g. drawing of district lines, teacher hiring, and so on. And the limitation of decision-making in the schools so as to comply with constitutional rights is not without precedent in other areas. *See, e.g., Epperson* v. *Arkansas,* 393 U.S. 97 (1968); *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943);

[11] *Turner* was not appealed and involved appointed, not publicly elected, officials. (See *Turner* v. *Fouche,* 396 U.S. 346, 348-349 (1970) involving a challenge to Georgia's method of selecting juries and school boards.) As distinguished, it hardly stands as precedent for the District Court's action.

> *Meyer* v. *Nebraska,* 262 U.S. 390 (1923). The extent of the court's power is limited to what is required to ensure students their right to a non-segregated education, but *within that parameter it may do what reasonably it must. Cf. Griffin* v. *County School Board,* [377 U.S. 218 (1964)]; *Faubus* v. *United States,* 254 F.2d 797, 806 (8th Cir.), *cert. denied,* 358 U.S. 829 (1958); *Kasper* v. *Brittain,* 245 F.2d 92 (6th Cir.), *cert. denied,* 355 U.S. 834 (1957)." (emphasis added) (A. 188).

Your petitioners contend that the "parameter" alluded to in the foregoing language is not as elastic as the Court of Appeals for the First Circuit would believe. One must ask whether the precedent established by the Court below is to be read as permitting a desegregation court to place one school after another in receivership until a federal judge is running the school system. This would hardly accord with Mr. Chief Justice Burger's observations in his dissent (joined by Justices Blackmun, Powell and Rehnquist) in *Wright* v. *Council of City of Emporia,* 407 U.S. 451, 477 (1972):

> "In Brown v. Board of Education, 349 U.S. 294 (1955) (*Brown II*), the Court first conferred on the district courts the responsibility to enforce the desegregation of the schools, if school authorities failed to do so, according to equitable remedial principals. While we have emphasized the flexibility of the power of the district courts in this process, *the invocation of remedial jurisdiction is not equivalent to having a school district placed in receivership.*
>
> • • •
>
> "This limitation on the discretion of the district courts involves more than polite deference to the role

> of local governments. Local control is not only vital to continued public support of the schools, but is of overriding importance from an educational standpoint as well." (emphasis added).

And the importance of local control over public schools has consistently been recognized by a majority of this Court. *Milliken* v. *Bradley*, 418 U.S. 717, 741-742 (1974); *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 50 (1973); *Wright* v. *Council of City of Emporia*, 407 U.S. 451, 469 (1972).

It is therefore apparent that, in extending the "limits" of what a desegregation court can do in aid of its efforts to dismantle a dual system, the Court of Appeals has established a unique remedy in clear disregard of the precedents of this Court.

B. *What Are the Standards for the Imposition of a Receivership?*

In this case, the method employed by a District Court involved the unprecedented stripping of the petitioners' control over South Boston High School without the benefit of hearing, after appropriate notice, as to whether the petitioners would be of assistance in remedying the situation at the school and without any substantial evidence that they were responsible for that situation.[12] In fact, the usual judicial sanctions of "contempt proceedings and further injunctions" were dismissed out of hand by the Court of Appeals as "plainly not promising" on its observation that the petitioners in office were uncooperative

[12] Petitioners made clear to the District Court their concern in this regard in their argument on their Motion to Stay. (A. 65).

since "the then School Committee had continuously resisted desegregation." (A. 186-187).[13]

The Court of Appeals went on to state that the District Court

> "had *reason to fear* that even direct orders to the [petitioners] would, *as in the past*, be met by resistance, subterfuge, or, at very least, delay. Furthermore, the South Boston High School problem came to a head when the membership of the School Committee was in lame duck status, a situation that *we may presume* further inhibited the likelihood of prompt action through *normal channels.*" (emphasis added) (A. 187).

But the District Court's findings, summarized by the Court of Appeals, had centered upon South Boston High School's two years of difficulty in adjusting to desegregation (A. 179-180) and had recited the continuing white identifiability of the school (A. 180), the physical and verbal abuse of black students (A. 180-181), the continued segregation (arguably voluntary) of the races within the school (A. 181), the faculty's attitude and failure to implement the desegregation plan (A. 181-182), the failure of the headmaster to take corrective action (A. 182-183), and the District Court's conclusion that the school was "devoid of the youthful spontaneity that one associates with a high school . . . [the students] victims of constant cynical sur-

[13] The District Court, of course, went even further. After indicating its intent to have South Boston High School "run by the Court under receivership until further order" (A. 27) and after giving its reasons for its belief that the school "can be the best high school in the entire city" (A. 27), it proceeded to harangue the petitioners for prior conduct and to suspend, on an interlocutory basis, the petitioners' control over two departments of the school system and their appointive power for four weeks (A. 32, 36, 37, 38, 40-42), matters not even the subject of the evidentiary hearings concerning the school.

veillance, unconcerned, uninvolved and cowed." (A. 95, 183). Nowhere does the Court of Appeals review any finding that the petitioners had caused this situation; nor could it, because the *only* specific finding the District Court made with respect to the petitioners was that they had failed to enforce the State's truancy laws (A. 21-22). Indeed, the Court of Appeals itself recognized that

> "[d]oubtless the difficulty [at the school] stemmed in no small measure from intentional conduct by private organizations and individuals in the South Boston community." (footnote omitted) (A. 184),

but went on to state that

> "difficult as was the position of school officials, there was reason to believe that conditions could have been, and still could be, ameliorated by them and that their *active and passive conduct contributed to the grave situation* so clearly at odds with the court's prior decrees." (A. 184), (emphasis added).

Petitioners are thus blamed, on the basis of their failure to enforce the truancy laws, for a situation caused in large part by community hostility to the Court's desegregation plan.

Yet, as unusual as the District Court's standard was for measuring the petitioners' culpability for the South Boston High School situation, more unorthodox was both Courts' circumvention of the usual course for judicially remedying that situation. Surely, once put on notice that the District Court felt constitutional rights were being infringed at the school, the "local authority" should have been afforded a hearing, with proper notice, to "proffer acceptable remedies." *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 16 (1972). Instead, the District Court, with the sanction of the Court of Appeals, automatically placed itself in the shoes of the publicly elected petitioners and assumed in every respect their plenary powers, *id.* at 15, over the school.

The standard set by both lower Courts in determining that such a radical approach was warranted appears, for all practical purposes, to have been that the petitioners only obeyed direct orders of the District Court. In connection with its observation that the School Committee then in office had resisted desegregation (A. 187), the Court of Appeals noted, as had the District Court twice before in these proceedings (A. 43-44, 109), that the School Committee's "leaders had advised the court on more than one occasion that they would obey nothing but direct orders. The [district] court had reasonable cause, therefore, to discount the likelihood of effective cooperation." (A. 187). Yet there was no showing that there was anything the petitioners themselves could have done, or that the District Court wanted them to do differently, at South Boston High School.

More unusual still is the District Court's pronounced displeasure with petitioners' taking an "advocacy" approach to this ongoing litigation (A. 109, 143-144). Were not the petitioners entitled, in traditional manner, to defend and protect the authority with which they have been entrusted by their electorate? Also, it is well, in passing, to question the wisdom of permitting a district judge, in deciding the issue of the effectiveness of his own desegregation plan, to establish his own rules for the taking of testimony and the examination of witnesses and to make findings of fact and determine questions of law on this issue, as was done here (A. 13-14, 19-27, 90-109, n. 4, *supra*).

• • •

Finally, with respect to both the question of whether receivership is within the limits of a desegregation court's

power and, if it is, the standards to be employed in determining whether it should be imposed, petitioners wish to note the ever increasing involvement of the District Court, tantamount to pre-emption, in educational policy matters. This Court has observed that "[s]chool authorities are traditionally charged with broad power to formulate and implement educational policy . . ." *Swan, supra,* at 16.

Nonetheless, one of the District Court's two experts commissioned by the Court to advise it on a day-to-day basis triumphantly wrote, relative to the Phase II desegregation plan, that "[n]o federal court order issued in the twenty years between *Brown* and *Morgan* . . . had ever been so consciously and explicitly aimed at effective improvements in public education," and concluded that "[a]fter the remedial order . . . every federal case concerning school desegregation will be more than what some lawyers call a 'race case.' Every case will be a case involving detailed educational planning . . ."[14]

The District Court has hewn true to its intent. In deciding that South Boston High School will be "run by the Court" (A. 27), it also decided that the classrooms needed to be painted (A. 116, 138-139), that the cafeteria floor needed scrubbing (A. 118), and that basketballs of particular brand name, whistles and ankle tape (A. 116-117) were necessary under the United States Constitution.

Your petitioners earnestly entreat this Court to draw the line. Absent clarification from this Court, other district courts in other cities confronted with the trauma of desegregation will look to Boston as precedent not only for receivership of a school, but for the wholesale intrusion

[14] Dentler, "Improving Public Education: The Boston School Desegregation Case," *The Advocate*, Suffolk University Law School Journal, Vol. 7, No. 1, Fall, 1975, pp. 4, 8.

by a district court into the educational, as opposed to the integrational, process.

The receivership order of the District Court is unprecedented and the circumstances surrounding its entry clearly reflect the need for the establishment of standards to be employed in the imposition of such relief. The First Circuit, moreover, has affirmed the receivership and the method of its imposition in the absence of precedent and contrary to the admonitions of this Court concerning the regard due local control of public education.

Other courts, other cities, other school boards, other parties plaintiff need the guidance only this Court can give, and such guidance is urgently needed.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES J. SULLIVAN, JR.
FRANCIS J. DIMENTO
PHILIP T. TIERNEY
DIMENTO & SULLIVAN
100 State Street
Boston, Massachusetts 02109
Counsel for the Petitioners

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-6641

JOHN J. McDONOUGH, ET AL.,
PETITIONERS,

v.

TALLULAH MORGAN, ET AL.,
RESPONDENTS.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JAMES J. SULLIVAN, JR.
FRANCIS J. DiMENTO
PHILIP T. TIERNEY
DiMENTO & SULLIVAN
100 State Street
Boston, Massachusetts 02109
Counsel for the Petitioners

Blanchard Press, Inc., Boston, Mass. — Law Printers

TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 72-911-G

TALLULAH MORGAN, et al.,
PLAINTIFFS,
v.
JOHN J. KERRIGAN, et al.,
DEFENDANTS.

PLAINTIFFS' MOTION FOR FURTHER RELIEF CONCERNING SOUTH BOSTON HIGH SCHOOL

Based upon the affidavits of numerous black students enrolled at South Boston High School (Attachments, pp. 1-56), and other statements, documents, and evidence attached to and described in this motion, plaintiffs move this Court for the entry of orders providing:

(a) that an urgent evidentiary hearing be held to consider the need to close South Boston High School to remedy the unconstitutional conditions which exist in that school; and that at this hearing, the Court and parties receive reports and recommendations concerning South Boston High School from the Community Relations Service (CRS), the monitoring staff and mediation panel of the CCC, and the officers of the state and local law enforcement agencies stationed in and around South Boston High School;

(b) that South Boston High School teachers James Scalese and Arthur Perdigao, and a white transitional aide known to the students as "Big Red" be added to this action as parties defendant, and be directed to show cause during this evidentiary hearing why they are not in violation of this Court's order prohibiting racial discrimination by all agents and employees of the defendant school committee;

(c) that the defendant Boston School Committee be ordered to commence proceedings immediately under Mass. Gen. Laws, Ch. 71, sec. 42, to remove the above named individuals permanently from any employment by the defendants for "conduct unbecoming a teacher" and for other good cause, the case against the personnel in said proceedings to be conducted by an attorney designated by counsel for plaintiffs in this action; and that pending the outcome of said proceedings, the defendant Boston School Committee be ordered to remove immediately the above named individuals from any duties, teaching or otherwise, within the Boston school system;

(d) that the local school and mayoral defendants be ordered to investigate immediately and locate one or more appropriate physical facilities, in a "neutral" location outside of South Boston, of sufficient size to provide for the relocation of the faculty, staff, and students of South Boston High School; and that the local school officials simultaneously report to the Court on the feasibility of reassigning the students, faculty and staff presently at South Boston High School to available seats and teaching positions at other high schools in the city where space is now available based on actual fall 1975 enrollments;

(e) that the defendant school committee members and superintendent be required to file within two weeks a plan for supervisors of attendance satisfying their responsibilities under Mass. Gen. Laws, Ch. 77, § 13 by investigating cases of persons inducing truancy by promoting school boycotts in violation of Mass. Gen. Laws, Ch. 76, § 4; and

(f) all other relief deemed by this Court to be appropriate and proper.

In support of this motion, plaintiffs make the following allegations:

(1) Since the first day of school in 1974-75, black students attending South Boston High School have been subjected to conduct interfering with their right to a peaceful, desegregated education and threatening their physical safety. This conduct, examples of which are detailed in this motion, has included assaults, racial epithets, and discriminatory treatment. Black faculty assigned to South Boston High School have also been subjected to harassment, verbal abuse, and physical assault.

(2) The severity of the ongoing mistreatment of black students at South Boston High School is demonstrated by recent events. The affidavits and other attachments show, for example:

(a) Black students in South Boston High School are presently being subjected to discriminatory treatment, abuse, and other lack of support by the predominantly-white faculty and staff of that school. One teacher, James Scalese, has climbed upon his desk and made gestures and sounds like a monkey in ridicule of black students. On a separate occasion he made similar monkey sounds and gestures in the doorway of his classroom at several black students outside. (Attachments, pp. 1-2, 36-37, 38)

(b) Another teacher, Arthur Perdigao, who is the school football coach, initially thwarted all attempts by black students to go out for the school's football team. On one occasion, he disregarded a note from the school's headmaster directing him to allow a black student to practice with the team. After a black assistant football coach was added to the coaching staff and six black students were allowed to come out for the team, the black players were made to ride to practice on separate buses, and were directed to practice, for

the most part, separate from the white members of the team. After the team's October 23 game at White Stadium, Coach Perdigao told the white players to "get them [the black players] at school the next day." Later he removed the black players from the team for asserted offences such as "smoking," although at least one of the black players is a total nonsmoker. (Attachments, pp. 38-42)

(c) Other offensive, racially discriminatory actions by other individual faculty members are described in the attached affidavits and in subsequent evidence and testimony plaintiffs intend to present at the evidentiary hearing.

(d) Other actions by South Boston High School faculty have undercut the smooth implementation of this Court's desegregation orders. After the South Boston Black Student Caucus met on October 8, 1975, and issued a list of grievances, the Citywide Coordinating Council (CCC) established a mediation panel to attempt to work out some of the problems in the school. On or about Thursday, October 16, 1975, after meeting with members of the panel, the South Boston High School faculty voted 26-24 not to cooperate with the work of this group. On information and belief, the faculty voted subsequently not to cooperate with a separate task force established by Superintendent Fahey.

(e) Despite this Court's ban on the use of racial epithets within the schools, black students in South Boston High School continue to be subjected to daily verbal abuse. In addition to familiar racial slurs, white students this year have employed the chant "2, 4, 6, 8, assassinate the nigger apes." (Attachments, p. 5). During the changing of classes, groups of white students frequently sing "bye, bye, black-

bird" and "jump down, turn around, pick a bale of cotton." The white student caucus of South Boston High School also issued a list of demands which included the demand that music be played over the school's public address system during the changing of classes for the express reason that "music soothes the savage beasts." (Attachment, pp. 14-15) The attached affidavits detail a number of instances in which school staff and police authorities stationed inside the building have heard such remarks and chants but have failed to take any corrective or disciplinary action. (Attachments, pp. 5-6)

(f) Black students in South Boston High School continue to be subject to frequent physical attacks by groups of white students. Many such incidents are described in the attached affidavits, and other examples of such incidents can be presented at an evidentiary hearing. Frequently, one or two black students have been attacked by a much larger group of white students, without provocation. More often than not, school and police authorities detain and suspend all the black students involved in the incident, but only one or two white students. The black students are disciplined for defending themselves from an unprovoked attack while numbers of the white attackers escape any disciplinary measures. (Attachments, pp. 2-3, 5, 22, 27-28, 34, 41, 46, 53)

(g) The police force stationed within the building has not been a neutral disciplinary force. The attached affidavits, and other testimony to be presented at an evidentiary hearing, reveal incidents in which police officials responsible for breaking up an interracial fight have held black students while white students continued to hit or kick them. One black female aide, wearing a clearly identifiable jacket with the word

"aide" on it, was hit, clubbed with a nightstick, and handcuffed by a state trooper, who later apologized to the aide and asked that charges not be pressed against him, when he learned that his actions were in error. On another occasion, several police officers physically carried a non-resisting black student down to the basement of the school, dropped him onto the floor, and threatened to "break his arms." (Attachment, pp. 2, 5, 10-11, 27-28, 33-34)

(h) During recent weeks, persons presently unknown to plaintiffs' counsel have promoted racial tension within the school through the distribution of inflammatory handbills to white students. Black students have observed the distribution of such handouts inside a small sandwich shop near the school, and at other places. One such handbill, distributed in late October, 1975, reads in part:

> TO ALL THE WHITE KIDS IN ALL THE SOUTHIE SCHOOLS . . . IF YOU THINK ITS JUST BUSING YOURE WRONG. ITS TOTAL TAKE OVER AND YOURE JUST SITTING ON YOUR ASS LETTING THEM . . . WAKE UP AND START FIGHTING FOR YOUR SCHOOL AND TOWN. ITS TIME YOU BECOME THE AGGRESSORS . . . DONT BE SCARED BY THE FEDERAL OFFENSE THREATS. A FIGHT IN A SCHOOL ISNT A FEDERAL OFFENSE . . . BE PROUD YOU ARE *WHITE* AND FROM SOUTHIE AND SHOW EVERYONE THAT THIS IS HOW YOU ARE GOING TO KEEP IT NO MATTER WHAT. (Attachments, p. 57)

Other examples of inflammatory handbills are attached. (Attachments, pp. 58-60)

(3) The events described in paragraph (2), which have occurred in South Boston during the opening months of Phase II, are part of a pattern of racially discriminatory and hostile conduct which began before the trial in this action, and has continued through the succeeding months of Phase One and Phase Two desegregation. The evidence suggests that this racial animosity and discrimination continues to intensify rather than lessen. A partial listing of racial factors surrounding South Boston High School, which are already part of the record of this case, include the facts set out below.

(4) Until the commencement of desegregation in September 1974, South Boston High School was a virtually all-white school. The following statistics show the school's student enrollment and faculty make-up in 1967-68 and 1972-73.

Year	— Students —			— Faculty —		
	B	W	OM	B	W	OM
1967-68	— 0	1602	0	— 1	78	0
1972-73	— 1	1819	23	— 2	106	0

Discriminatory conduct by school and other governmental officials created and maintained South Boston High School as a racially identifiable "white school." (See 379 F.Supp. at 425-28, 438, 440-49, 459-60, 463-66, 471-73.)

(5) The problem of discriminatory treatment of black students at South Boston High School existed and was recognized prior to court-ordered desegregation. (See Deposition of Dr. William Reid, September 12, 1972, pp. 12-23, 30-31, Plaintiffs' Trial Exhibit 570; Report and Recommendations of Louis Jaffee, May 28, 1973; 379 F.Supp. at 446.)

(6) On a number of occasions during the 1974-75 school year, crowds of white persons menaced black students assigned to South Boston High.

(a) On the first day of the 1974-75 school year, September 12, 1974, at the end of the school day, crowds of white persons in South Boston stoned the buses transporting black students and teachers from the schools in that community, including South Boston High School. Some of the black students and teachers were cut, and many buses were damaged. There were also stonings on the second day of school, September 13, 1974. (See Plaintiffs' Motion for Impoundment, and attached affidavits, September 13, 1974; Plaintiffs' Second Motion to Impound, and attached affidavits September 16, 1974.) Violence and harassment continued on subsequent days.

(b) In order to prevent or minimize the occurrence of such incidents, it has been necessary since the second day of the 1974-75 school year to assign large contingents of police to convoy buses transporting students to and from South Boston High School and to guard the area around that school. (See, for example, Attachments, p. 61, Deployment of Police, March 21, 1975.)

(c) On December 11, 1974, after a white student was stabbed in South Boston High School, a large crowd of white persons gathered at the school, preventing officials from returning black students to their homes. The black students were removed from the area by use of "decoy buses," after a substantial number of police reinforcements arrived at the school. Thereafter, South Boston High School was closed until January, 1975. (See Video Tape, Exhibit 1, December 13, 1974, pp. 102-104.)

(d) On May 8, 1975, after the Court had entered an order limiting gatherings near South Boston High School, a large crowd of white persons congregated at the school. Boston Police Commissioner Di Grazia

characterized the situation as follows in a letter to Secretary of Public Safety Barry on May 9, 1975:

> Several incidents have occurred recently in and around South Boston High School causing large hostile, aggressive crowds to gather in the vicinity of the high school. Today, May 8, 1975, a bus carrying students was stoned at the Dean-Hart School about 11:00 A.M. Therefore, I am requesting the restoration of the eighty-five (85) State Troopers, your department was utilizing as a reserve force at the Commonwealth Pier . . . (Attachments, p. 62)

(7) During the 1974-75 school year also—despite numerous precautionary measures—tension, disruption, and violence remained at such a high level in and around the school that the Mayor declared on October 7, 1974 that city police officials were no longer able to guarantee by themselves maintenance of public safety in South Boston and petitioned the Court to order a contingent of United States marshalls to assist in keeping order there. (Attachments, pp. 63-69; Letter of Mayor Kevin White and affidavit.)

(8) During the 1974-75 school year, black students assigned to South Boston High School were on their way to school, in the vicinity of the school, and within the school subjected to racial epithets, and vile and obscene gestures by white students and residents of South Boston. These incidents included chants such as "niggers eat shit" and the mimicking of a monkey. In addition, racial epithets were painted on buildings. (See Video Tape, Exhibit 1, December 13, 1974; Testimony, Transcript of Hearing, December 13, 1974, pp. 79-80, 85, 97-98, 101, 123.)

(9) Racial mistreatment in South Boston had not been limited to students. For example:

(a) Prior to the start of the 1974-75 school year, some black teachers assigned to South Boston High

School were harassed. (See Report of Boston Teachers Union to the Court, September 6, 1975)

(b) Some black teachers were riding on the buses stoned on the first day of the 1974-75 school year.

(c) Black teachers and staff have been subjected to racial epithets. (Testimony, Hearing of December 13, 1975, pp. 80, 85)

(d) Since the start of the 1974-75 school year, many black persons have been subjected to racial violence in South Boston. One such incident, a mob attack on an innocent passerby, resulted in a federal court conviction of one of the perpetrators which explicitly linked such general violence to interference with exercise of black students' constitutional rights under this Court's orders;

(e) Some white residents of South Boston have been subjected to harassment for conduct such as participating in a bi-racial council election. (See Attachments, pp. 70-73)

(10) The problems which black students have experienced at South Boston High School are to a significant degree the result of intentional conduct by organizations and individuals in South Boston. For example

(a) The South Boston Home and School Association, during 1974-75, and the South Boston Information Center, during 1974-75 and 1975-76, have promoted, successful school boycotts in violation of state law. See Mass. Gen. Laws, Ch. 76, § 4. These actions have created a climate in which more serious violations of law were likely to occur, and have occurred. (See Attachments, pp. 74-80)

(b) The South Boston Information Center has promoted racial tension. (See Attachments, pp. 81-83)

(c) Persons presently unknown to plaintiffs' counsel have promoted racial tension. (See Attachments, pp. 57-60)

(11) On information and belief, plaintiffs allege that the defendant school committee members and superintendent have not acted against persons urging truancy. (See Mass. Gen. Laws, Ch. 77, § 13.)

(12) The Court has attempted by a series of actions to improve the situation in South Boston High School and other schools. On October 9, 1974, December 17, 1974, and September 5, 1975, the Court entered orders concerning, *inter alia*, the assignment of police personnel to South Boston High School and other schools; "safe areas" around schools and bus routes; persons entitled to enter school and racial epithets. By an order entered on October 4, 1974, and in subsequent orders, the court provided for the creation of parent and student councils. The student assignment process set forth in the Phase Two Plan provides initially for choices of school. The Plan also provides for university and business involvement to enrich educational programs. The Court has directed actions to upgrade the physical plant at South Boston High School. For months, large numbers of police have been stationed inside and outside of South Boston High School. The affidavits of black students filed with this motion demonstrate that these actions have not produced a viable nondiscriminatory educational program. (See Attachments, pp. 1-56) Black students continue to be subject to assault, and offensive, humiliating and discriminatory treatment.

(13) As a result of the conduct described in this motion, black students (and white students) assigned to South Boston High School have lost many days of education.

(14) The assignment of school system staff (administrators, teachers, aides, custodians, cafeteria personnel, etc.) and police personnel to South Boston High School in 1974-75 and 1975-76 have contributed to the continued identification of South Boston High School as a "white school." (See Attachments, pp. 84-89)

(15) Considering the implementation of the Phase One and Phase Two desegregation plans as a whole, the problems experienced at South Boston High School have been unique in their duration and intensity.

(16) The problems experienced at South Boston High School in 1974-75 and 1975-76 are to a substantial degree a consequence of the school's location in South Boston as opposed to a "neutral area" (*i.e.*, an area not so intensely associated with either the white or black community). (Attachments, pp. 7, 9, 23, 37)

(17) In recent years the local school and mayoral dedefendants have frequently obtained, and converted to school use, facilities originally designed for other purposes. Examples include Temporary Madison Park, the L Street (Bathhouse) Annex, and the Haley and Hernandez Schools.

Respectfully submitted,

ROBERT PRESSMAN, ERIC E. VAN LOON
(Center for Law and Education)
RUDOLPH F. PIERCE
(Keating, Peretta & Pierce)
LAURENCE S. FORDHAM,
J. HAROLD FLANNERY,
(Foley, Hoag & Eliot)
JOHN B. LEUBSDORF
(Boston University Law School); and
NATHANIEL R. JONES, (N.A.A.C.P.)
Cambridge, Massachusetts 02138

(s) ROBERT PRESSMAN
ROBERT PRESSMAN
(s) ERIC E. VAN LOON
ERIC E. VAN LOON
Center for Law and Education
Harvard University—Larsen Hall
Cambridge, Massachusetts 02138

Dated: November 17, 1975

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 72-911-G

TALLULAH MORGAN ET AL.,
PLAINTIFFS,
v.
JOHN J. KERRIGAN ET AL.,
DEFENDANTS.

NOTICE OF HEARING AND PROCEDURAL ORDERS
November 19, 1975

GARRITY, J. Plaintiffs' motion for further relief concerning South Boston High School will be heard November 21, 1975 at 10:00 A.M. in the John W. McCormack Federal Building, Boston, Massachusetts. As provided by Rule 43(e), Fed. R. Civ. P., the matter will be heard on affidavits presented by the respective parties, except that the court may at the hearing direct that certain affiants and other persons whose attendance is ordered herein give oral testimony.

The defendants Boston School Committee and Superintendent of Schools are ordered to procure the attendance at said hearing of the following persons: John J. Kelly, Deputy Superintendent; Joseph M. McDonough, District Superintendent of Community District 6; William J. Reid, Headmaster of South Boston High School; Harold Goorvich, Assistant Headmaster; and the following teachers at South Boston High School: James Scalese, Arthur Perdigao, Mr. Hamann of Room 208 and Ms. Allen of Room 218; and also an officer or representative(s) of the faculty senate at South Boston High School who is able to explain the circumstances and grounds of the vote of the faculty senate on or about October 16, 1975 by a vote of 26 to 24 not to cooperate with the mediating board constituted by

the Citywide Coordinating Council on October 9, 1975. It is further ordered that defendant Marion J. Fahey, Superintendent of Schools, attend in person.

Plaintiffs are ordered to procure the attendance at said hearing of South Boston High School students Nos. 1, 2, 3 and 7[1]; and other affiants whose presence is requested by designated code number by counsel for the school committee and superintendent by 4:00 P.M. on November 20 for the specific purpose of cross-examining said students as to the subject matter of their affidavits. If plaintiffs plan to offer the oral testimony of other affiants, plaintiffs' counsel shall notify counsel for the school committee and superintendent by 4:00 P.M. on November 20.

The defendants school committee and superintendent are further ordered to file by or before 9:00 A.M. on November 21, 1975, and to serve copies on counsel of record previous to the commencement of the hearing on November 21, a complete description of all persons currently attending South Boston High School in any capacity, using for this purpose attendance on Tuesday, November 18, 1975. This description shall present as complete a picture as possible in words, of every aspect of the personnel. It shall include the following information:

(a) Students — the grade and racial classification (white, black and other minority) by total numbers, of the 540 students who attended on November 18, 1975, and a similar breakdown by grade and race of students enrolled at South Boston High School[2] as of that date (which totaled 891 as of October 17, 1975).

(b) With respect to each faculty member assigned to South Boston High School, name, residence including street address, racial classification (white, black or other minority), course(s) taught, and year when first assigned to South Boston High School.

(c) Similar information with respect to every member of the administrative staff at South Boston High School, including name, residence including street address, racial classification, position, and year when service at South Boston High School began, this information to be furnished with respect to all persons regularly employed at the school including guidance counsellors, office personnel, nurses and administrative aides.

(d) A list of persons other than those described in the three previous subparagraphs who have been furnished ID cards for the purpose of admitting them to the school during school hours, showing where possible the name, residence including street address, and racial classification of each such person.

It is further ordered that a similar complete description be filed with respect to all persons currently attending the L Street Annex of the South Boston High School in any capacity, using for this purpose attendance on November 18. The same information as called for in subparagraphs (a)-(d) of the previous paragraph shall also be filed and served by the times stated in the previous paragraph. It is noted that on November 18, 221 students attended L Street Annex and that the enrollment there as of October 17 was 343.

Defendant Superintendent Fahey is also directed to file and serve by the times stated in the previous paragraph a statement of the names and positions of any separate task force established by her to deal with problems at South Boston High School, and the date when such task force was established.

---

[1] A separate impounding order as to the identities of the student affiants was entered yesterday.

[2] All references to South Boston High School in this paragraph refer to the main high school building only.

The defendant Mayor of the City of Boston is ordered to file and serve by the times above stated a statement describing state police personnel currently stationed inside South Boston High School during school hours, using the situation on November 18 for this purpose. This statement shall divide the police into two residential categories, namely, residents of Boston and residents outside Boston, and shall show by total numbers the number of white, black and other minority police officers in each of the two categories. The statement shall also give the same residential and racial information separately with respect to any supervisory state police officers stationed inside the school; and similarly with respect to any City of Boston or Metropolitan District Commission police and their supervisory officers, if any, stationed inside the high school. A separate statement similarly broken down and containing the same types of information shall be filed for the high school's L Street Annex.

(s) W. Arthur Garrity, Jr.
United States District Judge

United States District Court
District of Massachusetts

[Title omitted in printing]

DEFENDANT SCHOOL COMMITTEE'S OBJECTION TO NOTICE OF HEARING AND PROCEDURAL ORDERS AND MOTION FOR CONTINUANCE

The defendant School Committee hereby objects to the provisions of the Notice of Hearing and Procedural Orders entered November 19, 1975, and moves the Court to continue for thirty (30) days the hearing scheduled for November 21, 1975. In support hereof, the defendant School Committee assigns the following grounds:

1. The shot-gun approach of the Notice of Hearing and Procedural Orders (hereafter Notice) denies the defendant School Committee of a fair trial on the issues. Counsel for the School Committee did not receive a copy of the Notice, setting the hearing for 10:00 a.m., November 21, 1975, until approximately 4:30 p.m. on November 19, 1975.

The Superintendent and eight School Department employees are ordered to appear at this hearing, yet no adequate opportunity is given counsel to confer with these individuals. The defendant School Committee is given one working day in which to compile a "complete description of all persons currently attending South Boston High School in any capacity . . . [which] description shall present as complete a picture as possible in words, of every aspect of the personnel."

2. The unconscionably short period of time between the Notice and the hearing denies the defendant School Committee of adequate representation of counsel. It is inconceivable that the defendant School Committee and its counsel should be expected to be prepared to rebut the allegations contained in anonymous affidavits and documents submitted with the plaintiffs' Motion for Further Relief Concerning South Boston High School, which Motion, with attachments, was not served on counsel for the defendant School Committee until Tuesday, November 18, 1975. Fundamental fairness mandates something more than a day's notice before a party must defend against the allegations of unknown affiants.

3. The Notice, moreover, is preferentially prejudicial to plaintiffs. There are many other matters of pressing importance before the Court in this case, yet the plaintiffs request and are granted an urgent evidentiary hearing on the closing of South Boston High School. The allegations of urgency are seen as hypocritical and unfounded when

it is remembered that while the plaintiffs have for some time been intending to seek the school's closing, they have not deemed it advisable until November 18, 1975, to enlighten the Court or the parties as to the specifics of their complaints.

4. The Notice is objectionable for the further reason that it requires the defendant School Committee to reveal the names and addresses of all teachers and other staff at South Boston High School, some of whom are potential witnesses at the hearing. These individuals are no less subject to possible harassment and intimidation than are plaintiffs' anonymous affiants.

Indeed, the prejudicial and preferential nature of the Notice is manifested by the treatment accorded plaintiffs' affiants, whose identity the Court insists on maintaining a mystery while at the same time protecting them from cross-examination by Rule 43(e).

In sum, the defendant School Committee vehemently objects to the provisions of the Notice of Hearing and Procedural Orders and, relying on the fundamental dictates of due process, requests at least a thirty-day continuance in this matter.

By its attorneys,
DiMento & Sullivan
(s) James J. Sullivan, Jr.
James J. Sullivan, Jr.
100 State Street
Boston, Massachusetts 02109
523-5253

November 20, 1975

United States District Court
District of Massachusetts

STENOGRAPHIC TRANSCRIPT OF PROCEEDINGS

December 9, 1975

[69] *Afternoon Session*

(The hearing was resumed at 2:20 o'clock p.m.)

The Court: Well, I apologize for being late.

The Court would prefer always to file a written memo accompanying decisions, but sometimes it is not feasible, and this chances to be one of those situations. You will recall, for example, that I put out the desegregation plan in May and then put out the supporting memo in June.

This opinion or memo today will not cover every aspect of the hearings that we had on the plaintiffs' motion. That is, there are some matters which will not be covered, and I will get them into some written order, I expect before the end of the week. One illustration would be the proposal that met with considerable agreement, that the media be admitted to the schools. That is a proposal that will be acted on, and very probably favorably but with a variety of conditions, and I have not had time, frankly, to think through the conditions. That is just one example of some things that will be added.

Today I am anxious to get the orders out, and certain parts of the findings of fact will be filed subsequently, and I hope, again, before the week is out, and some of these written orders will also be filed, as I will explain, but there are two reasons why I want to get this matter decided. Number one is because it is of such importance, and number two, [70] because I get so many inquiries from people who are anxius to learn the Court's rulings.

Turning, then, to the particular motion of the plaintiffs that we had the hearings on, the Court's first finding,

set of findings, is that, generally speaking, the plaintiffs proved the allegations in their motion. As we have seen at so many different times in this and other cases, there are two parts to any court finding: first, what was proved, and secondly, what should be done about it; the difference technically between remedy and liability.

Turning to the motion — and that I have to do, and I would ask perhaps counsel if they have a copy of the motion to turn to it — the Court has already ruled on many parts of the motion. It it denied, the motion that the individual teachers be added as defendants, and denied, motions that they be added as parties.

With respect to the motion Paragraph E that the committee be ordered to file a plan for supervising attendance and causing people to investigate persons inducing truancy by promoting boycotts, I reserve judgment on that, and will cover that at a later date.

With respect to the factual allegations in the motion, without reading every finding that the Court makes, I want to make these findings by reference to the motion, and I find that the plaintiffs have proved by a clear preponderance of [71] the evidence the following allegations in their motion:

Paragraph 1 in its entirety.

Paragraph 2 is subdivided into A, B, C, D, et cetera, subparagraphs. In 2-A, the first sentence I find is a fact, but strike the word "abuse." That shoud be stricken. In a minute I will explain that I do not make findings with respect to the allegations pertaining to the individuals Mr. Scalese and Mr. Perdigao except in one particular aspect, and I will explain the basis for that ruling.

Turning to Paragraph D, sub-D, the Court so finds. Subparagraph E, the Court so finds, with one qualification. The word "daily" is stricken in the third line of that

subparagraph where it says "daily verbal abuse." I find they were subjected to verbal abuse, but not daily.

Subparagraph F is changed in so many respects in my finding, and I am going to read it as found. It is a substantial departure from the proposal. The finding is as follows:

Black students in South Boston High School have been subjected to physical attacks by groups of white students. One or two black students have sometimes been attacked by a much larger group of white students without provocation. School and police authorities have detained and suspended all the black students involved in the incident, but only one or two white students. Black students have sometimes been [72] disciplined for defending themselves from an unprovoked attack, while numbers of the white attackers escape any disciplinary measures.

The difference in the Court's finding and in the proposal is that the proposed finding is in terms of these things happened frequently, and more often than not, this happened. I find that these things happened, but not frequently and not on any regular basis.

The next finding is Subparagraph H.

Then turning to Paragraph 3, the Court adopts that as a finding but strikes from the proposal the second sentence in that subparagraph. That is the sentence which says that racial animosity and discrimination continues to intensify rather than lessen. That sentence in the paragraph the Court strikes, because I think that was not shown, and I do not believe that that is the situation.

Paragraph 4 the Court finds as submitted; 5; 6, that means 6-A, 6-B, C, D.

Turning to Paragraph 7, the Court so finds; 8; 9; 10; 11, except that the Court strikes the opening six words, or seven words, "On information and belief, plaintiffs allege that." The Court finds, as submitted, that the defendants

School Committee members and superintendent have not acted against persons urging truancy. That is a fact.

Paragraph 12 is so found, except in the very last [73] sentence it is changed to read, "Black students have been subject to assaults," et cetera, and the words "continue to be" are replaced.

Paragraph 13 as drafted, and the same with 14, 15, 16 and 17.

Turning to the aspect that, with one exception, the Court makes no findings either way on, the allegations against Messrs. Scalese and Perdigao, with one exception, to be explained in a minute, the Court already denied summarily, and the reasons are these: The Court already denied summarily the only substantive relief sought against those individuals. In closing argument, the plaintiff, in the light of that, asked that the Court make declaratory statements about their individual liability, but courts do not make declaratory statements which are unnecessary to their decisions.

As the Court endeavored to explain several times during the course of the hearing. the purpose of the hearings, in the Court's mind, was not to fix liability on any particular individuals; rather, to determine larger issues, specifically, issues connected with whether the desegregation plan promulgated by the Court is being implemented, is it being carried out at South Boston High School.

Finally, the individuals Messrs. Scalese and Perdigao were not parties to the case, to the motion. The Court denied the plaintiffs' motion to have them added as parties, [74] and there was no action taken to add them as parties. I am aware also that there is litigation pending elsewhere with respect to at least one of the individuals, and the Court believes that if it were to make findings of fact on those matters, it might very well, without sufficient

foundation, affect the course of pending litigation in other courts.

The exception to my conclusion is that no findings should be made either way with respect to the Scalese and Perdigao allegations has to do with a situation and not an incident. The Court will not make findings on incidents, but rather on a situation. That has to do with the fact that the Court does find that the South Boston High School football team was kept segregated by Coach Perdigao, and in order to explain the basis of that finding and conclusion, because it has other consequences, which I will come to in a few moments, I owe to the parties and to Coach Perdigao a statement of the basis of the Court's conclusion.

The Court's original order imposed an affirmative obligation on the School Committee and the School Department to eliminate all consequences and vestiges of segregation previousy practiced. I will omit references to citations which are in the typewritten draft from which I am reading. The Court's desegregation plan imposed a more specific obligation to conduct extracurricular programs on a desegregated basis, and that is here in the plan, and there [75] is no need to pause to state the page reference. It is Page 3. Thus, as football coach, Coach Perdigao was under a more specific obligation to take affirmative action to implement program desegregation more than some other persons in different situations. The evidence adduced at the hearing in my view clearly showed that Coach Perdigao failed to fulfill his obligation to take affirmative action to desegregate the football team and to conduct himself in a nondiscriminatory fashion.

South Boston High had no football team during the 1974-75 school year. Thus, it was necessary to recruit an almost entirely new team. The first practice was scheduled for August 28th. Dr. Reid phoned Mr. Perdigao on or

about August 2nd and offered him the position of head coach after telling him the main concern would be to have an integrated team. Mr. Perdigao accepted, and set about recruiting a team, placing a notice in the South Boston community newspaper, which apparently succeeded in attracting sufficient white players for the first practice.

A few days before the first practice, Coach Perdigao decided to hold physical examinations for black players at a medical center in a predominantly black neighborhood, and to place a notice in the black community newspaper. That notice did not appear before the first day of practice, and there was no evidence adduced at the hearings that it ever did [76] appear. Coach Perdigao went to the medical center. At the planned time, no black students showed up.

During the first week of school, orientation assemblies were held for all students at South Boston High School. Mr. Perdigao spoke at the assemblies and expressed interest in having more students try out for football. At the close of each assembly, he spoke with students who were interested in football, including several black students. At least two black students, Marcus Anderson and Michael Watson, returned completed athletic cards with a doctor's and a parent's signature, but they did not join the team at that time.

Several weeks later, after the black students' protest on October 8th, five blacks and several whites did join the football team as new recruits, on or about October 16th. Mr. Perdigao did treat all new recruits, black and white, quite alike. The new recruits had to practice for five days without uniforms and for five days with uniforms before they could play in a game. Thus, none of them played in the first game thereafter against Dorchester High on October 23rd.

On that day, the black recruits sat in the stands without uniforms. At the conclusion of the game, a racial fracas

broke out. I do not make any findings with respect to the allegations about what Mr. Perdigao may or may not have said with respect to white students getting back on the bus when he was endeavoring to get them back into the bus and away from the [77] melee that was in progress in the center of the field. Even if he said what the plaintiffs alleged him to have said, it was the type of a single statement, it is an incident, in my view, it is not a situation, and the Court will not make findings with respect to particular incidents. It could very well be that the motive of Mr. Perdigao, had he told the white students to do what the plaintiffs allege he did, was simply to get them back into the bus and out of the way, to protect them and everyone else, so the Court makes no finding with respect to that matter, for the reason that it is not a hearing here to determine the individual liability of any particular person.

I turn now to the events of the following day, October 24th, when there was a major confrontation of near riot dimensions between black and white students at South Boston High School at the commencement of school. Mr. Perdigao stayed out of school. On Saturday he informed the newly appointed black coach and the black recruits that all five black recruits were off the team. Mr. Perdigao said that he removed two black recruits for throwing equipment and two for smoking. Yet he did not learn that one of the black recruits had been smoking until the following Monday. Thus, for that recruit and one other, Marcus Anderson, Coach Perdigao had only what he called "safety reasons" for removing the black players from the team.

[78] This type of justification does not suffice for the different treatment which was afforded those black students. Mr. Perdigao was under an affirmative obligation to conduct the football program on a desegregated basis, and in the Court's opinion and finding, Mr. Perdigao failed to fulfill that obligation. He did not recruit blacks until

after the first week of practice, thus placing them at an initial disadvantage and indicating to them that they really were not wanted. When blacks showed an interest in joining the team, he did not follow up by encouraging them and seeking them out. Instead, as he testified, he felt it was their own choice and that he had no responsibility of his own to see whether or not they came out for the team. When blacks finally did join the team, he removed them on the first available pretext. His action in doing so was discriminatory. The record of Mr. Perdigao's direction of the football team's program at South Boston High School failed to meet the requirements of the Court's order.

That concludes the findings on that aspect of the matter.

In addition, the plaintiffs' evidence plus two visits by the Court to South Boston High School provided a clear answer in my mind to the question whether or not the Court's plan is being implemented at South Boston High School, and the conclusion that at least to me is very clear and serious is not by a long shot. The details of the Court's finding [79] that the plan is not being implemented or even being close to being implemented at South Boston High School will be filed in a memorandum of separate findings on that point, which I am unable to address comprehensively at this time. I will say only one thing along those lines and will elaborate in written form.

The Court did return to South Boston for a second time, and, as was reported, a reason was so that I could take up where I had left off on the first visit, which I had to cut short, but there was an additional reason. I felt that I should return because I could not really believe what I saw there on my first visit and I wanted to go back to see whether my initial conclusions and observations were, at least to the best of my ability, accurate.

So, with respect to the basic allegations of the plaintiffs in their motion, the Court finds and concludes that the

plaintiffs did prove the number one allegation in their motion, that the black students at South Boston High School are not receiving the peaceful desegregated education to which they are entitled under the Fourteenth Amendment to the Constitution of the United States; and secondly, and equally important in this present context, the Court's desegregation plan is not being carried out at South Boston High School and the Court proposes to make a variety of orders to see to it that it is.

[80] What should the remedy be? The plaintiffs' proposal is that the high school should be closed and relocated, or that the student body, after the school is closed, should be dispersed to other schools, and the court denies that motion in that regard. The remedy will not be the closing of the South Boston High School, and the reasons, and there are many, follow, or some of them follow.

The first and principal reason for not closing the high school is that the racial tensions and educational deficiencies at South Boston High School are, in my opinion, more readily curable by other measures than by closing the school, and those measures will be ordered today and made more specific by written orders which I will issue before the end of the week. Basically, as I will develop in a moment, the South Boston High School is not going to be run by the School Committee, the South Boston High School is going to be run by the Court under receivership until further order.

The other reason for keeping South Boston High School open is that from what I saw and what I heard in testimony and what I believe since getting involved in this picture over a year and a half ago, South Boston High School can be the best high school in the entire city, in my opinion. The combination of Southie pride and Roxbury courage, when it is made to work and when it is put to constructive use, can make this school the best high school in the City

of Boston. I am [81] not going to develop, because it is unnecessary to develop, all of the assets that are waiting to be built upon in South Boston High School.

Think of the children who are going there right now. To a great extent, both white and black are attending that school under enormous difficulty and against enormous pressure from people whom they know in their own communities, so right at the beginning, you have the fact that the students want an education badly enough to undertake enormous personal sacrifice in order to get an education. Given half a chance, South Boston High School I do believe can be a great school, and one that students of all races and backgrounds will attend with a vitality and purpose that is missing there presently.

In that respect, I simply subscribe to the report of the Mediating Board, which I distributed to counsel at the beginning of the hearing and was dated November 18th, and this is the CCC Mediating Board, which stated that the Board remained firm in its conviction that the lessening of racial tensions and the provision of quality education in a secure environment is still possible at the South Boston High School. I would change the words "is still possible" to the words "will occur." It is going to happen there, and the expectation of the Mediating Board and others who have faith and hope in that school and other schools is going to be fulfilled.

[82] I will divert for a moment to address specifically the suggestion and argument which was perhaps not originated but which appeared in the list of white students' demands in the opening paragraph, and then counsel picked it up at the hearing before me, sought to make something of this allegation, and alleged "conscious effort of the black community and the black students to create incidents to provoke the closing of South Boston High School," and that was the innuendo of counsel cross examining some of

these black students, that these allegations were the result of a sinister move by the black community to close the high school.

My finding and conclusion and determination on that question is that there was not a scintilla of evidence presented before me to back up any such litigation. What should the black community do when the students come back with these tales of intimidation and hostility in the schools to which they are being sent? Did the black parents and leaders of the black community want the school to be closed? Absolutely yes. Of course they wanted and have moved and have come into Court to seek that the school be closed, but that thought is not a novel thought with the black community. Didn't the mayor himself and the Commissioner of Police himself urge that the school be closed? Mr. Cunningham, President of the Faculty Senate, on the witness stand said that in his opinion, the situation was deteriorating there and it was not unlike [83] the situation that built up previous to the tragic Michael Faith stabbing a year ago last October.

So I cannot imagine that, given the background of things that happened last year and this year at that high school, there would not be a sensible and perfectly logical and understandable petition on the part of some members of the black community, especially the parents of those youngsters, to have the place closed so that the children would not have to attend school there, but in a more friendly atmosphere, but that is quite different from saying that there were false stories and false reports manufactured in order to do injury to the people of South Boston.

I do not see Mr. Portnoy here, but he represented the individual teachers who were named, and he himself stated that he did not consider that there was any recent fabrication of allegations by the black pupils who took the witness stand, and he explicitly disavowed the innuendos that crept

into the examination of those black students and the specific argument by School Committee counsel that they— I do not want to be mistaken. He said in response to my question that he would leave that up to Mr. Portnoy, but the Court finds, as conceded by capable counsel, Mr. Portnoy, that there was no recent fabrication of these stories. They were told in good faith. That does not mean that every word that was stated was true, but there was community conspiracy on the part of the black [84] community to deprive South Boston of its closest and properly called neighborhood high school.

The reason basically why the school is not being closed is because the Court is extremely confident that the situation can be turned around there, and quickly. It has already been demonstrated that the black pupils and white pupils alike can go to and from school with safety, and I cannot conceive of the Court and its agents and the School Department and its agents being unable to make the school as safe inside as it is going to and from and to harness the energies of these young pupils productively.

What, then is the Court's order? In two respects — I have mentioned receivership first, and I will come to that in a minute, but there are two important orders which, while not receiverships, have some of the characteristics of receiverships, and I will turn to them. First I will refer to the Department of School Security Services, about which I inquired this morning. This is the impounded filing by Miss Fahey on the 26th of November, which I referred to this morning and asked Mr. Tierney, and I will make it more specific, please, by Thursday if you can, to indicate what portions should be continued to be impounded and what not. But the Court hereby schedules a hearing on Friday of this week, that is, the 12th of December, at ten o'clock, to hear the parties with respect to proposals for modifications or changes or amplifications in [85] this plan.

Mr. Tierney this morning said that perhaps the School Committee would consider this plan, which is generally what has been needed all along, what the Court has been waiting for all along, and what School Department officials have been endeavoring to get for weeks, if not months or longer, but which we have not yet received, and the Court, after hearing whether there should be modification in this plan, is going to order it into effect.

The Office of School Security Services, which is set up in this plan, would deliver the kind of programatic and other support to schools like South Boston and other schools where the situation could be improved, and the operations of this department, which is set up in detail in this plan, are needed desperately at South Boston High School and elsewhere. The department will be headed by a special assistant to Miss Fahey, and under him or her there will be three coordinators: Coordinator of Safety Programs, of Pupil Personnel Safety, of Investigation, Disciplinary Procedures. Then there are teams and personnel under them.

This is the sort of program that is needed and that can help immeasurably, but where has it been? For weeks and weeks, I estimate at least two months, this need has been discussed in a series of hearings in open court, and as far as the Court is convinced, when it comes to action by the School [86] Committee as distinguished from the members of the School Department, the Curt might just as well have been talking to the wind. It is impossible to get action in support of the—I do not want to overstate it. In this respect, it has been impossible for the Court to get action from the Boston School Committee.

Looking back in my notes here, my notes of a hearing on October 2nd, here is a group, a search committee, that was going to find someone to head up this department, and I wonder what happened to these people. It was Peter Blau-

velt, from Prince George's County; Alex Villio, from Akron, Ohio. Those are my notes. Joseph , Former Commissioner McNamara; a man named Sidney Cooper, from New York. The target date for selection of a person to head up and organize this type of a department was the first of November.

We went from Mr. Walsh in the summertime, who himself, together with Mr. Leftwich and others, and his was a coordinating holdover capacity, to the Cour 's insistence that somebody be put in charge and get this sort of support and program operating, and it was wished upon Mr. Doherty, who had as much as he could handle, and who was not by background and training able to take hold of an operation such as this, and finally the Court had to put it temporarily in the hands of Mr. Kelly, the Deputy Superintendent.

The Court can wait no longer and will wait no longer. [87] The hearing on Friday will be to consider the proposals of the parties with respect to this plan. There may be modifications. I do not suppose it is proposed as being the perfect plan. I will hear suggestions for modification, expansion, or whatever, and then will order it to be put into effect without the participation of the Boston School Committee. In other words, the powers of the Boston School Committee are being superseded, they are being bypassed in this important respect. That plan will be ordered into effect by the Court.

Tl.e persons to be appointed will be exclusively within the province of Miss Fahey, and I hope it will not redound to her disadvantage for me to state on record that the Court has developed an enormous respect and confidence in Miss Fahey over the last weeks and months. This is an excellent plan, and if it can be put into effect, it will help tremendously at South Boston High School and elsewhere.

So that is the program with respect to the Department of School Security Services. We will have a hearing, I will hear all sorts of objections, and then will come out with an order, but the gist of the order is what I have stated. There will be a special assistant to Miss Fahey, as proposed in this plan, and the School Committee will be enjoined from interfering with the establishment of this department and will be ordered to cooperate in that respect.

Similarly, we need action of a like nature with respect [88] to the Office of Implementation, which has been the orphan and stepchild of the School Committee in its efforts to delay implementation of the Court's plan. The Office of Implementation has been, despite the best efforts of good people, well, a failure, in the sense of even approaching its potential. I certainly do not want to tak about the magnificent work by Mr. Lambert, by Mrs. Byard, and other members, particular members, and Mr. Donahue too. I am not talking about the people. I am talking about the way it has been throttled by the School Committee, which has refused to appropriate funds for it, which has refused to appoint people to it, and on a previous occasion, talking about the School Committee, I compared the situation to a legislative body trumpeting its devotion to a particular cause but denying any funds to the organization that would carry forth the program proclaimed.

When it comes to action, it is funding and it is staffing that is required, and in this situation, the Office of Implementation has, in my opinion — I think the best phrase is the one that became current a year or so ago — it has been left slowly twisting in the wind. That is what has happened to the Office of Implementation here, and that is going to stop. We are having a similar office, and the Court will be making orders that that office is to be formulated by Miss Fahey, and it is to be done without participa-

tion by the School Committee, whose course of conduct in these [89] proceedings is going to be changed.

I need, for the purposes of the record and my finding, to make some reference to the background of this office and what it is that I am talking about and why is it that I am so obviously concerned. At the beginning, as with so many other aspects of this case, is the plan. The plan provided, at Page 102, as follows, and I quote: "The School Department shall develop and file on or before May 23, 1975 a detailed plan of activities, responsibilities, and internal scheduling for the implementation of the plan ordered by the Court, the available time period similar to that filed in Section VII of the plan filed by the School Committee itself on January 27." That filing came in, and the copy I have here, but I believe that the filing that was made previously was June 6th.

The vehicle for implementing the Court's plan was submitted by the School Committee pursuant to court order, and the document was entitled Implementation Process and Schedule for Student Desegregation, and the implementation process described 14 subdivisions, 14 types of agencies within the School Department which would take action, and they were given letters, capital letters, for the components of this plan, 14 components, Parts B to O.

After an introductory paragraph, it stated at the bottom, and now we are on Page 14 of the 14 components which were detailed in this document, "All are essential and [90] interlocking. However, the first component, B, relates to the actual mechanism for school system implementation supervision and coordination, and therefore this component has prime significance."

You get to the responsibility for carrying out the plan. It lists what is called, I quote, "the chain of command," and you have first the School Committee; second, the superintendent; and then comes the Office of Implementation, and

it is set out, Director, Implementation Coordinator, Staff, Assistant for this and that; Assistant for this and that; so forth; liaison; representative of the schools, and so forth.

That is the importance which the School Committee itself attached to this office, and the Court relied on this, to its regret, because to this day there has not been a permanent appointment to the Office of Implementation. To this day there has not, despite a number of requests by the Court, been any funding of that office. Oh, of course, it is possible for the office to operate in a way; it is possible for Mr. Donahue to go over to one of his assistant directors, to go over and take advantage of the generosity of the superintendent or assistant superintendent in the matter of supplying pencils and paper and supplies, or to get an automobile to make an essential trip to some part of the city, something of that nature, but the course of conduct of the School Committee has been to reject on more than one occasion, and [91] the most recent occasion was within ten days, any move to give that office the permanent appointments, the salaries, the staffing necessary to have it do more than go through the motions of implementing the order of the Court.

Why, people in that office have not been paid for overtime that they spent at Court order last summer. The only action taken by the School Committee was to transfer people from their other jobs without loss of salary to the Office of Implementation, and that is the vote I referred to this morning. It was taken August 20, 1975. This was Mr. Leary. He has assigned the following named teachers without change of rank or salary to the Office of Implementation, subject to the approval of the School Committee, and that is the last that has been heard of the School Committee on that one.

Now, the plan, here is the procedure on that. And let me say that this office is not going to be buried in the office of

any of the deputy or associate superintendents, the deputy superintendent or the associate superintendent, but it is going to be established by court order, again, without the participation of the Boston School Committee at a level parallel to the level of the Department of School Security Services, which is incorporated in the November 26th filing by Mrs. Fahey, and the reorganization plan that was voted on December 5th, and I will come to more about that in a minute, will have to be changed in order to create— [92] perhaps it will be called the Department of Implementation.

One of the difficulties in implementing this desegregation plan that has sort of grown in my realization with the passage of the weeks and months is that the Court's order has been directed to the School Department, and there really is no such thing as the School Department. You know, you look in the telephone book, and you cannot find anything under the School Department. It is people. And the Court, perhaps, mistakenly, relied upon the School Committee to aid its agents, principally Miss Fahey, but a lot of other people, hundreds of people working with her and under her, to carry out that plan of implementation, but it has not been done, and one of the fruits of this policy pursued by School Committee in my opinion has been the situation down in South Boston High School. It could have been avoided, and it can be corrected, and will be.

The Office or Department of Implementation is by court order going to have funds at its disposal, funds with which to do things, such as to employ statisticians or other types of— I mention statisticians. There are so many other types of specialists who are needed to carry out a desegregation plan. It will have authority to appoint personnel necessary to carry out the provisions of the plan. I am not talking now about teachers, I am talking about special persons and things needed.

[93] Here is the procedural way that we will go about it. The Court will undertake to formulate and get out to counsel a draft order with respect to establishment of an Office or Department of Implementation. It will be similar in scope, although— Well, it will be the same general idea, as far as description, table of organization and description of the types of persons and their duties and so forth. It probably will not be quite so good as this Department of School Security Services, on which we will have the hearing on Friday, but I will get to counsel as soon as possible, I would hope by Friday, a draft order establishing or directing Miss Fahey to establish this Office or Department of Implementation, and then I will invite the comments of counsel.

The same procedure will be followed as I did with respect to racial-ethnic councils. I drafted it, got it out to you people, got your comments back before it went into effect, and the same with other things we have done, such as appointment of the masters. Then after I hear your objections and after I hear proposals for suggestions, changes, modifications, then and only then would I promulgate an order, but I would hope to have a hearing on this subject midweek next week, perhaps Wednesday or Thursday, the 17th or 18th, and I would hear objections and proposals with respect to that.

I have mentioned the receivership of South Boston High School, and I will develop that in a minute. In the [94] promulgation and establishment by the superintendent of these two offices, School Security Services and Implementation, the Court's orders do strip the School Committee of some of its powers with respect to the plan. I will state first that this is being ordered to the minimum extent that the Court feels is necessary if this desegregation plan is to be implemented and if there is to be desegregation of the schools. I recognize that in taking this course, I am depart-

ing from the recommendation of the Civil Rights Commission of the United States, which stated, at Page 64 of its report:

"A partial receivership, for example, for desegregation matters only, is inadvisable. In such a situation, School Committee members would remain in a position from which they could exercise a negative effect on desegregation efforts. For example, School Department staff acting to facilitate school desegregation would know that their careers were still in the hands of School Committee members who oppose desegregation." end of quote.

So there is, as I have said on several occasions, a matter pending before this Court, which is to put the whole operation in receivership, but I do not want to do it, obviously, except, in my view, if absolutely necessary. I think, to the extent that I have already stated, in these three respects, receivership of a single school, bypassing the School Committee in two critical aspects of the [95] implementation of the plan, the Court has no alternative if this matter is ever to be resolved. I just do not have the capacity, let alone the time, to take up the problems in a whole series of schools which develop and which could be nipped in the bud if the peope at the top were interested in cooperating, and we will simply hope that it works.

Now turning to the receivership of South Boston High School, and the last is to be a freeze on appointments by the lame duck School Committee, and I will get to that in a minute, and they will be specifically enjoined from making permanent appointments. The next permanent appointments that are going to be made will be made by the new School Committee, not by the present one, but that comes in a minute.

With respect to the receivership of South Boston High School, I will, of course, file a written order on this. It is all part of the package. Number one, it will include L Street,

so that it will be a receivership of both G Street and L Street, meaning basically that that high school will be run by the Court, not by the School Committee, until further order. When that order will come, that is, when the receivership will terminate, I frankly have not thought out as yet, and I have a number of alternatives in mind.

It may be until the end of the school year, it may be until some lesser time, but the specifics of this order, and there will be many specifics, will be filed, I hope and [96] expect, before the end of the week, but the principal specific of that order will be as of the end of 1975, the entire full time academic administrative staff at South Boston High School will be transferred to some other school. That means not only Dr. Reid but also all full time assistant headmasters at both G Street and L Street, that is, those whose duties are altogether administrative; and also that Coach Perdigao be transferred from South Boston High School; provided that none of the personnel at that school whose transfer will be ordered by the Court shall suffer any loss in seniority or compensation; and the city defendants, namely, the members of the School Committee and superintendent, will be ordered to cooperate in placing these persons in positions where they will suffer no loss in compensation.

The next point I will try to make more earnestly and clearly in my written memorandum on this subject, and I will endeavor to state it emphatically and clearly. These transfers will be ordered not because of any racial discrimination which has been performed by any of the people mentioned. I mean to include all of these persons, and especially Dr. Reid. The reasons for the transfer are not that these good people and skillful people have been discriminatory in the performance of their duties. The reason is that the Court's plan is not being implemented at South

Boston High School, and the Court intends to carry out its responsibility to see to it [97] that it is implemented.

That facet of the Court's ruling, lest it do an injustice to the people who will be transferred, I will elaborate on when I file the writing. It is a question of where the responsibility lies, and if the situation is in many respects deficient, the burden of responsibility must be shifted.

This receivership, incidentally, although there will be a confirmatory written order, will commence tomorrow, namely, the 10th of December. The city defendants, that is, the School Committee and the superintendent and the mayor, and the state defendants, the Board of Education, are ordered to cooperate with the receiver and to enable him to carry out the orders of the Court. The receiver, whom the Court will name in the order, is District Superintendent Joseph McDonough. I will be in touch with Mr. McDonough directly. I saw him, I might say parenthetically, not about a receivership, mind you, but I saw him and discussed some matters with him on my way back from South Boston High School on my second trip to the school last week.

Finally, the freeze, or what I call the moratorium on permanent appointments. This order is effective now, and it is an injunction. The members of the School Committee and their attorneys, agents, and employees are enjoined individually and collectively from appointing or installing, whether by transfer or by new appointment, any permanent [98] appointment at the level of those positions covered by the promotional rating system or to positions shown in the superintendent's reorganization plan approved by vote of the School Committee on December 3, 1975.

This morning Mr. Tierney stated that he thought that there might be a meeting of the School Committee tomorrow. Please be sure, Mr. Tierney— or, in order that the

record may be proper, I direct you to advise your clients School Committee members of this injunction, which is effective now, although it will be put into written form as soon as possible, and I expect before the end of the week, their power is taken away from them not only with respect to South Boston High School and not only with respect to the establishment of the Office of Implementation or Department of Implementation and Department of School Security Services, but also with respect to their making permanent appointments between now and the end of their tenure as members of the Boston School Committee.

This injunction expires on January 6, 1976. It does not apply to persons who will be— the people with whom I will be dealing in endeavoring to have the Court's desegregation plan carried out.

The bases for the Court's order that there be a moratorium on permanent appointments are as folows: It is important, in my view, that the provisions of the plan [99] which provide for specific community input into the selection of persons for permanent appointments be carried out with respect to appointees to both positions covered in the promotional rating systems and positions in the plan of the superintendent which was approved on the 3rd of December. I am not talking about campaigns before neighborhood groups. I am not talking about procedures which would overrule the discretion of Superintendent Fahey in these matters. I am talking about an opportunity to get to her for such consideration as she wishes to give it the appraisal of prospective appointees to these positions.

A second reason is that the Court's orders with respect to the Office of Implementation and the Department of School Security Services will probably call for certain revisions in the table of organization, which was approved by the School Committee by vote of December 3rd.

Permit me a brief diversion to say that this moratorium and injunction against the School Committee members has no reference to the establishment of a Department of School Security Services or Department of Implementation, because in those instances, the School Committee is out of it. Those appointments are going to be made by Miss Fahey in her discretion, but with respect to appointments other than those, as to which the School Committee will have full powers, such appointments are enjoined until the new School Committee comes [100] into office.

Some of these acting administrators have been acting for years and years, and there is no reason for precipitous or hasty action by a lame duck School Committee to place into critical positions persons who they perhaps feel are committed to their outloook and viewpoint on a desegregation plan involving forced busing, which chances to be diametrically opposed to the Court's. Appointments to positions of principal, or, as we now call it, building administrator, and these staff positions are absolutely crucial to the implementation of the Court's plan.

There is much more to a desegregation plan than just bringing the students into a school. What goes on inside the school is as important as what goes on in transporting the pupils to and from school. There is a two-volume compilation recently published on "The Courts, Social Science, and School Desegregation," and one of the articles is entitled, How to make Desegregation Work: The Adaptation of Schools to Their Newly Integrated Student Bodies," written by Gary Orfield, O-r-f-i-e-l-d, of the Brookings Institution, and I want to quote one small paragraph, because I think it is so important here, on what he calls the central role of the principal, and I quote:

"Report after report on desegregated schools mentions the central role the principal plays in determining the [101] school's response to the desegregation crisis. While in

normal circumstances the principal's role may be ambiguous, his authority limited, and his job largely routine, when schools are suddenly reconstituted with substantial numbers of new students and faculty members from racial and ethnic groups not previously represented, the principal often becomes an extremely important figure. He must control and manage the early conflicts and tensions, build positive morale, strengthen school-community relationships, and help teachers work out better educational reponses."

There is much more here, including the quote about a successful desegregation due primarily to the principal's attitude of acceptance and his leadership skill. The last one is taken from a book by Charles Willie, Dr. Willie, one of the court masters, who wrote a book on this subject entitled "Race Mixing in the Public Schools," in 1973, one of the reasons for the Court's feeling that he might be a valuable member of the panel of masters.

So that this moratorium on permanent appointments by this outgoing School Committee is based upon the need, in the Court's opinion at least, to protect the desegregation plan from being frustrated and defeated by the lame duck School Committee, whose majority, and I want to emphasize that word majority; I do not speak of all of the members, I speak of the majority of those members who have done at least [102] everything, in my opinion, that they could lawfully do to delay implementation of this desegregation plan. Why? Because it invoves forced busing.

I have in mind the written responses, again, of a majority of the members of the School Committee that is outgoing. One of them is quoted here in the appendix to the opinion in the plan, wherein the School Committee member stated, and there were two others substantially to the same effect, that he would do nothing to "supplement the plan." This is Mr. Kerrigan: "I will obey and carry out

all lawful orders of the Court, but I will take no initiative or affirmative action to advocate or suppement any such plan."

Well, that is precisely what the law of the United States requires that the school committee man do and that the school officias do, including the principals and headmasters and the assistant headmasters, to take affirmative action. So the majority of the School Committee set its sails against implementation of this plan a long time ago, and the Court will not stand by and permit a hurried and unnecessarily hurried selection and appointment of persons to key roles. They are the keys. The new appointeees to these crucial and critical positions must be responsible to the new committee, which will be responsible to the Court. Otherwise the [103] plan could well be shackled by thse indirect activities of the persons who have directly done what they could to shackle it. I refer again to the majority, not to all the members, the majority.

So that is an injunction, and that will be in writing. It will be served on them personally. And you, Mr. Tierney, as an officer of the court, are directed to advise them orally, so that there are no mistakes, at tomorrow's meeting. Have you any questions about the purport of this last injunction?

Mr. Tierney: Yes, sir.

The Court: Well, I would appreciate your putting them so that I could clarify anything.

Mr. Tierney: I am, first of all, informed, sir, that there is not a meeting tomorrow, there is a meeting Thursday at two o'clock.

The Court: It does not matter when it is. It could be any time. They can do all sorts of things, but not make permanent appointments to these critical positions.

Mr. Tierney: I wish to clarify my understanding that the appointments that are enjoined are those appoint-

ments to any positions covered by the promotional rating system or shown in the superintendent's reorganization plan.

The Court: Both. In other words, there is a [104] difference.

Mr. Tierney: And.

The Court: Yes. Both. And.

Mr. Tierney: Yes, sir.

The Court: Now here it is, ten minutes of four.

Mr. Tierney: Is your Honor finished?

The Court: Well, I was just— Well, I will not leave without giving you a chance to say whatever you wish. There we were, talking about the promotional rating system. Let me please confer a minute with Mr. Flaherty. He may remind me of things I intended to say but have not.

(The Court conferred with Mr. Flaherty.)

The Court: Yes. That does conclude the Court's findings and orders on that motion. Now let me hear what you wish to say.

Mr. Tierney: Your Honor, I will not attempt to object to everything the Court has stated. I believe the Court is aware of the position of my clients in this matter. I only would enter, with the Court's permission, and note for the record the objection of the Boston School Committee to the Court's actions as encompassed by the Court's statement this afternoon.

I would note that the Court's obligation in the view of my client is to create a unitary school system. [105] That has been done, and it is our position that the Court's job has likewise finished with respect to desegregation. I note that respectfully, your Honor, and I would further request that we be given the opportunity to have the Court's orders in writing as soon as possible. Thank you.

The Court: It is a good request. Yes, Miss Lynch.

Miss Lynch: Your Honor, on behalf of my clients, I

would like to suggest a slight extension of one of the orders made by the Court. The Court has imposed a moratorium on all permanent appointments. Before the Court currently is a reorganization plan which was submitted by the superintendent and has been approved by the School Committee. It had been my understanding that counsel would be given the opportunity to comment on the provisions of that plan before it received court approval.

The terms of the court order as it stands right now do not prevent the School Committee from making acting appointments in accordance with that reorganization plan. For instance, one area in which I am particularly concerned is the provisions of the plan regarding vocational education. For instance, the reorganization plan would give to the assistant superintendent in that area four associates. Those are new positions. They could be [106] filled on an acting basis, and that, in effect, would lead to a further fragmentation, we believe, of the vocational management system.

Therefore, I think until the parties have had an opportunity to comment on that plan, it would not be appropriate for the School Committee to make even acting appointments based on that reorganization chart. I would ask the Court to modify its order to take care of it.

The Court: Does anyone want to be heard on that? Yes, Mr. Tierney.

Mr. Tierney: I would simply note my objection.

The Court: Well—

Mrs. Sticklor: Your Honor—

The Court: I will get to you in just a moment. Let me get back to Miss Lynch.

I am looking at the table. Where does that appear? Are you talking about the vocational education plan?

Miss Lynch: No, it is not the vocational education plan. It is the associate—

The Court: There are five associates and one deputy.

Miss Lynch: It is the Associate Superintendent for Instruction. I believe the plan calls for her to have assistants in the area of basic education, general education, alternative education, instructional resources, and [107] some help in the area of career education. My clients do object to that structure even on an acting basis.

Mr. Van Loon: Your Honor?

The Court: Yes. Oh, no, I am sorry. Mrs. Sticklor was up first.

Mrs. Sticklor: Your Honor, the defendant mayor supports the suggestion of Board of Education that the injunction imposed by your Honor be extended to include acting positions until the New School Committee is in effect. We note briefly three pooints as the basis for our support.

It is our understanding also that the reorganization plan would be appropriate for comment by the parties as to the various aspects. It is our understanding that there would be some matter that would be considered by the Court.

Secondly, it has been the experience of the Boston public schools, insofar as individuals have been appointed to positions on an acting basis, that such appointments create difficulties in changing the individuals filling those positions on a permanent basis, and the Court now has before it the question of appointment of permanent administrators, which would be resolved by the Court at the same time. We feel that appointing individuals on an acting basis in the interim would [108] create further difficulties.

Lastly, your Honor, we feel that the position of the people of Boston insofar as the Schol Committee will—members of the School Committee will be changed effective January 5th, when the School Committee is now in a lame duck situation, that the will of the people would best be served by a moratorium on acting appointments as well until the new School Committee is constituted.

The Court: I wish I knew what the scope of this is. That is my problem.

Well, let me hear from Mr. Van Loon.

Mr. Van Loon: Your Honor, we rise to vigorously support also the position of the state board and the mayor in proposing that none of these appointments be made even on an acting basis for what is, in effect, a brief, three-week period which includes the traditional winter holidays, when less activity goes on. We believe that in addition to all the other points that have been made, if appointments are to be made for a number of these positions on a permanent basis in the system, to be worked out by Mr. Kennedy, through the next couple of months, appointing a number of people on an acting basis lame duck right now may further simply gum up the rating system as to who has what experience as far as making more permanent appointments.

[109] We believe rather than having that possibly done now for three weeks and then other acting changes made for these positions during the next four months so that we can have a permanent position starting July 1, that it simply makes sense to wait until we have the new committee in place to make acting appointments.

The Court: Well, if I understood the ramifications of it, it would be easier.

Let me ask Mr. Tierney. Try to say something constructive. I know you object, but I mean, what is at stake here? If there is some important acting appointment that should be made, I cannot see that I should say it could not. I just do not understand, as I say, the ramifications of it.

Mr. Tierney: One of the ramifications, your Honor, is the fact that Associate Superintendent Leftwich needs assistant—he needs personnel assistance to help him in implementing the vocational plan. That is just what we con-

ferred about, and he informs me that in some fashion, there should not be issued an injunction that would encompass his being able to obtain the assignment of personnel to work with him on the vocational plan.

The Court: But isn't this exactly what they did for months and months and months on the Office of [110] Implementation? They just never put anybody down there except on a temporary assignment basis.

Mr. Tierney: On the contrary, your Honor. I hesitated to go into that when I spoke, but the fact of the matter is that after Superintendent Leary, at the suggestion of Miss Fahey, brought these names to the Committee's attention, the committee voted them into office until September 1st, when Miss Fahey took over. I am informed that when Miss Fahey took over, the committee again voted these people in.

The Court: No, they did not vote them in anything. What they did was transfer them to that office as teachers on loan.

Mr. Tierney: It had to be that way, your Honor—

The Court: It did not.

Mr. Tierney: —because the office did not exist. I likened it to the existence of a corporation.

The Court: Well, it will exist before the month is out if I have anything to say about it.

Mr. Tierney: Well, I only brought that point up about Mr. Leftwich's needs, your Honor.

The Court: Yes, Mr. McMahon.

Mr. McMahon: Your Honor, may I ask a question as to your order concerning the receivership at South Boston High School?

[111] The Court: Of course.

Mr. McMahon: That question is in terms of the personnel ordered to be transferred.

The Court: Correct.

Mr. McMahon: Do I understand your Honor to state assistant headmasters in subject areas and department heads will be transferred?

The Court: No. Only those persons— I tried to be careful. I said the persons who are on the full time academic administrative staff. Teacher-assistant headmasters do not come within that definition.

Mr. McMahon: Well, your Honor, I believe—

The Court: They are not full time administrators. They are part time teachers and part time administrators, and therefore they are excluded.

The receiver, I might say, is going to be directed to review the entire faculty and staff at that school and to recommend to the Court any transfers that he thinks should be made in the best interests of that school and of the implementation of the plan. That is something that I did not touch upon.

Mr. McMahon: Your Honor, that may be clear, but persons who are in the job title of assistant headmaster (subject area) are not subject to the transfer order. Some are full time administrators.

[112] The Court: Then they must go, and here is what I have in mind specifically. When the school was overcrowded and was on double sessions, there was assistant headmasters who were teaching, but because of the double session feature and because of the need for additional full time administrators, they were relieved of their teaching assignments, and to this day do not teach. Those are included in the group of persons whose transfer is mandated.

Mr. McMahon: On their behalf, may I enter my objection?

The Court: Positively.

Mr. Coleman: Your Honor, one brief question and clarification. When you stated the end of 1975 for transfers,

you were referring to the calendar year rather than the school year.

The Court: Correct.

Yes, Mr. Portnoy.

Mr. Portnoy: Your Honor, I apologize for being here late. Unfortunately the Clerk's Office did not notify me of this hearing. I would just like to clarify some information I have received since I have been here.

The Court: Right.

Mr. Portnoy: As I understand it, you have entered an order of no finding against all three of my clients.

[113] The Court: No, not quite. As to Mr. Bilotas, the matter was dismissed and withdrawn with respect to him. With respect to Mr. Scalese and Mr. Perdigao, I have entered no findings with respect to them, with the one exception of a set of findings against Mr. Perdigao, finding that he did not carry out the plan which required that he take affirmative action to desegregate the football team, and further directing that he and others at the high school be transferred to a different school at no loss in salary.

Mr. Portnoy: Thank you, your Honor. Will this be a written order?

The Court: Yes.

I want to get back to this acting matter. How many positions are we talking about? Do you know, Mr. Van Loon?

Mr. Van Loon: No, I do not, your Honor, but I believe that one indication would be to look at the impounded Department of School Security Services. There is a central organization chart toward the back of that which lists—

The Court: But that has to do with the Department of School Security Services, and Miss Fahey is going to make those appointments, and the School Committee has been and is again enjoined from interfering with her in [114] that regard.

Mr. Van Loon: I am saying, your Honor, that immediately preceding Page 36 of that plan is an organization chart of the whole School Department, with district superintendents and others, and I believe that some indication of the number of positions is given there listed under the names of each of the associate superintendents.

The Court: All right. Here is the Court's order on this whole matter. With respect to the injunction against the School Committee making permanent appointments and imposing a moratorium until after the new School Committee takes office, it is expanded as follows:

With regard to appointment on an acting basis, those appointments are also enjoined unless with court approval. By this I do not mean approval of the names, but rather approval of the positions to which appointed. The first approval of such an exception to the injunction is the appointment of such persons on an acting basis as Miss Fahey considers Mr. Leftwich needs in carrying out the responsibility that he is now discharging with regard to formulation and implementation of the unified plan for vocational education and occupational education. The Court will, if Mr. Tierney wishes, similarly exempt from any prohibition against acting appointments a whole [115] shopping list of such positions if there is any basis for acting appointments.

By way of illustration, I consider that the brief comment that he made is a proper basis for having Mr. Leftwich go forward with acting appointments in the area just described. What the court intends here with respect to acting appointments is to avoid the situation alluded to by Mrs. Sticklor and Miss Lynch and Mr. Van Loon. If there is a need for an acting appointment, by all means, one or several will be permitted, but there has to be some showing of need, not simply a matter of putting people into a position

simply because they will thereby gain an advantage over the competition when the new School Committee comes in.

Well, that concludes this aspect of the hearing. It has lasted longer than I thought. I think that, subject to hearing from you, I might continue the other matter to the next hearing, but maybe someone has some particular points. There is a variety of motions in other regards pending, like attorneys' fees and a lot of other things.

What do you have?

Miss Lynch: As to the security plan hearing which is scheduled for Friday, at the current moment the security plan is impounded.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 72-911-G

TALLULAH MORGAN, ET AL.,
PLAINTIFFS,
v.
JOHN J. KERRIGAN, ET AL.,
DEFENDANTS

ORDER SUSPENDING APPOINTIVE POWER OF SCHOOL COMMITTEE

December 9, 1975

GARRITY, J. An order of the court providing for a four-week moratorium beginning December 10, 1975 on appointments by the current school committee which concludes its term of office on January 5, 1976 issued from the bench

on December 9, 1975, on the basis of findings of fact and conclusions of law dictated to the court reporter; and is hereby confirmed. It is ORDERED that

The defendant Boston School Committee and its agents, attorneys, employees and assigns are enjoined, individually and collectively, from making any permanent, acting or temporary appointments, including appointments by transfer: (1) to any school department position specified in Superintendent Fahey's September 15, 1975 or October 14, 1975 "Proposed Central Organization of the Boston Public Schools," filed with the court on November 5, 1975, or in Superintendent Fahey's September 3, 1975 or October 14, 1975 organization plans as approved by the vote of the school committee on December 3, 1975; or (2) to any school department position which is subject to the procedures outlined in the February 5, 1973 document, "A Proposal for a Promotional Rating System," filed with the court on September 27, 1974 by the city defendants or as updated on November 3, 1975; provided, however, that acting appointments to particular positions may be made subject to prior court approval.*

The defendant school committee's request for acting appointments to fill positions to assist Associate Superintendent Charles W. Leftwich in implementing the Unified Plan for Occupational and Vocational Education is granted.

This order shall expire on January 6, 1976.

(s) W. ARTHUR GARRITY, JR.
United States District Judge

---

* Prior court approval pertains to the filling of a particular position, without any requirement that the identity of the prospective appointee be disclosed.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 72-911-G

TALLULAH MORGAN, ET AL.,
PLAINTIFFS,
v.
JOHN J. KERRIGAN, ET AL.,
DEFENDANTS

ORDER CONCERNING SOUTH BOSTON HIGH SCHOOL

December 9, 1975

GARRITY, J. After hearing plaintiffs' motion for further relief concerning South Boston High School and upon consideration of the arguments of counsel, on the basis of findings of fact and conclusions of law dictated to the court reporter on December 9, 1975 and later supplementary findings and conclusions on plaintiff's motion, it is hereby ORDERED, by way of written confirmation of orders issued from the bench on December 9, 1975, that South Boston High School (both main building and L Street Annex) be placed in temporary receivership of the court effective December 10, 1975 and that Joseph M. McDonough, Assistant Superintendent for Community District 6, be appointed temporary receiver of South Boston High School. The limited, general purpose of said receivership is to accomplish as soon as feasible such changes in the administration and operation of South Boston High School as are necessary to bring the school into compliance with the student desegregation plan dated May 10, 1975 and all other remedial orders entered by the court in these proceedings, e.g., desegregation of faculty and staff.

It is further ORDERED that:

(1) The temporary receiver and the defendant superin-

tendent of schools together arrange for the transfer from South Boston High School to other positions in the Boston public school system effective on the first school day in January 1976, without reduction in compensation, benefits or seniority, of the building administrator, full-time academic administrators who do not presently instruct classes and coach Arthur Perdigao; and arrange for the appointment, subject to prior court approval, of a new building administrator and administrative staff, which shall be desegregated; the new building administrator shall assume office on January 2, 1976 and shall participate with the temporary receiver and the superintendent in the selection of the new administrative staff.

(2) The temporary receiver, in consultation with the new building administrator, (a) review and evaluate the qualifications and performance of all faculty, guidance and other educational personnel in the light of the special demands and strains on such persons in the days ahead at South Boston High School and arrange with the superintendent of schools, who is hereby ordered to cooperate, for the transfer from South Boston High School to other positions in the Boston public school system, without reduction in compensation, benefits or seniority, such persons as he may determine; and arrange with the superintendent of schools, who is hereby ordered to cooperate, for their replacement with newly hired teachers or transfers from other high schools; (b) file with the court on or before February 2, 1976 a plan and chronology for the substantial renovation of South Boston High School including the cafeteria and kitchen, gymnasia and equipment, music and art departments and facilities for business office education, automotive mechanics and sheet metal shops; and (c) endeavor to enroll students assigned to South Boston High School who have not been discharged to attend other

schools and establish separate catch-up classes for returning students including a summer school if necessary.

(3) The temporary receiver consider the following questions and subjects and report his recommendations on them to the court: (a) a schedule for reducing the numbers of uniformed police inside the school, (b) regarding transitional aides, reducing their numbers, providing for equal numbers of white and black aides, employing two or more other-minority aides and obtaining uniforms for aides, (c) activation and development of Racial Ethnic Parents' and Students' Councils, (d) Thompson's Island Academy program proposal and (e) joint meetings with representatives of paired university and businesses, viz., the University of Massachusetts, Gillette Company Safety Razor Division and Federal Reserve Bank.

(4) All parties and intervenors in these proceedings, their agents, attorneys and employees, cooperate with the temporary receiver in the performance of his duties; and that the defendant Boston School Committee reimburse Mr. McDonough for all reasonable expenses incurred by him in his capacity as temporary receiver whether or not he would be entitled to reimbursement in his capacity as district superintendent of Community District 6.

(s) W. Arthur Garrity, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
[Title Omitted In Printing]

MOTION TO STAY ORDERS OF DECEMBER 9, 1975

The defendant, the School Committee of the City of Boston, moves that implementation of the following orders entered on December 9, 1975, be stayed pending appeal:

1. That the School Committee of the City of Boston be enjoined from making appointments to vacancies which exist in the School Department.

2. That a receiver be appointed to take over the operations of South Boston High School and the "L" Annex.

3. That the headmaster, assistant headmaster, football coach, department heads and other administrators be transferred from South Boston High School and the "L" Street Annex.

4. That the Superintendent oversee the operations of the Office of Implementation and the Department of School Security Services without interference by the School Committee.

In support of this motion, the School Committee states that the actions of the District Court are without precedence and should not be implemented without allowing the School Committee an opportunity for hearing on appeal.

By its attorneys,
DiMENTO & SULLIVAN
(s) JAMES J. SULLIVAN, JR.
James J. Sullivan, Jr.
100 State Street
Boston, Massachusetts 02109
(617) 523-5253

December, 10, 1975

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No.

TALLULAH MORGAN, ET AL.,
PLAINTIFFS,
v.
JOHN J. KERRIGAN, ET AL.,
DEFENDANTS.

MOTION FOR A STAY

The School Committee of the City of Boston moves for a stay of implementation of the following orders of the District Court entered on December 9, 1975, pending appeal, to wit:

A. That the School Committee of the City of Boston be enjoined from making appointments to vacancies which exist in the School Department.

B. That a receiver be appointed to take over the operations of South Boston High School and the "L" Street Annex.

C. That the headmaster, assistant headmaster, football coach, department heads and other administrators be transferred from South Boston High School and the "L" Street Annex.

D. That the Superintendent oversee the operations of the Office of Implementation and the Department of School Security Services without interference by the School Committee.

In support of this motion, the School Committee states:

1. It has moved in the District Court for a stay of said orders. It is expected that this stay will be denied because of the time constrictions which affect the order.

2. Failure to stay the District Court's order relative to the power to make appointments will make the order moot by the time an appeal is heard. The term of office of the

present School Committee, which is an elected body, expires on January 6, 1976. On that date, two of the present five members will be replaced. If the stay is not granted, the present School Committee will suffer irreparable harm because it will have been deprived of its right to continue in office for a full term. In effect, the District Court has limited their term of office. Every day that passes without a stay is a prior restraint upon the School Committee's plenary power.

3. Failure to stay the District Court's order relative to South Boston High School and "L" Street Annex will irreparably harm the School Committee. It will have lost its day-to-day control over the fiscal operations of these schools and the power to decide what education will be offered. There is no power in the District Court to require the whole scale transfer of administrative staffs and the imposition of a receiver to perform the functions of duly elected officials. Counsel can find no case where a receiver has been appointed to perform the functions of elected officials. If no stay is granted, the citizens of Boston will have lost their local control over the operation of these schools and will have no way to redress any grievence relative to the operation of these schools.

4. Failure to stay the District Court's order relative to the grant to the Superintendent of the powers of the School Committee will irreparably harm the School Committee. The power of overseeing the operation of the School Department vests in the School Committee. If the Superintendent exercises these powers, then the powers of the duly elected School Committee will have been compromised. The electorate will have lost its control over the day-to-day activities and funding of these operations.

5. These orders are unique in American jurisprudence. The first order has established precedence for the termination of "lame duck" appointments. The District Courts,

by using their equity powers, can usurp the powers of elected officials, including the President, to appoint persons after those elected officials have been defeated in a bid for re-election. In effect, the District Court is exercising the executive function. The second, third and fourth orders remove from elected officials their traditional and statutory powers and put them into the hands of appointed officials. This will establish precedence for the District Courts controlling the operations of the legislative branch of government. These novel orders, intruding upon the powers of the legislative and executive branches of government, should be stayed until the appeal is heard.

6. Notice of appeal relative to these orders has been filed in the District Court.

By their attorneys,
DiMENTO & SULLIVAN
(s) JAMES J. SULLIVAN, JR.
James J. Sullivan, Jr.
100 State Street
Boston, Massachusetts 02109
(617) 523-5253

December 10, 1975

STENOGRAPHIC TRANSCRIPT OF PROCEDURES

[1] UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 72-911-G

TALLULAH MORGAN, ET AL.,
PLAINTIFFS,
v.
JOHN KERRIGAN, ET AL.,
DEFENDANTS.

Before: HON. W. ARTHUR GARRITY, JR.,
District Judge.

Court Room No. 1
Federal Building
Boston, Massachusetts
December 15, 1975

Appearances:

Robert Pressman, Esq., and
Eric E. Van Loon, Esq.,
for the plaintiffs.
James J. Sullivan, Esq., and
Philip T. Tierney, Esq.,
for the defendants School Committee
Sandra L. Lynch, Esq.,
Counsel, Board of Education, and
Timothy J. W. Wise, Esq.,
Assistant Attorney General,
for the defendants State Board of Education
Marilyn L. Sticklor, Attorney,
Assistant Corporation Counsel,
for non School Committee city defendants.
John F. McMahon, Esq.,
for the Boston Teachers Union.
Richard W. Coleman, Esq.,
for the Boston Association of School Administrators
and Supervisors, AFL-CIO.
Pamela Taylor, Attorney,
for El Comite de Padres.

[2] PROCEEDINGS

The Clerk: Civil Action 72-911-G, Tallulah Morgan versus John Kerrigan et al.

The Court: I received the court orders, transcript of the court orders, that were dictated on the afternoon of December 9th, and have here the motion of the plaintiff to stay the orders entered then. I also brought up the opinion of the Court of Appeals when they considered applications for stay on a different motion back in June, June

17th, because I think the principle stated would be helpful, and I want to state preliminary view of this matter in just one minute.

Before doing so, I want to acknowledge Mr. McLaughlin's presence here.

Mr. McLaughlin: Yes, your Honor.

The Court: I received a letter from Miss Fahey, Mr. McLaughlin. I don't know that I received an appearance letter or slip from you or your firm.

Mr. McLaughlin: An appearance slip was filed, your Honor, along with that letter.

The Court: Thank you.

Now with respect to this motion, I consider that Paragraphs 1, 2, and 3 are final orders of the type that are appealable, but Paragraph 4, which is the one about the superintendent making appointments independently of the [3] School Committee to the Office of Implementation and Department of School Security Services I think of as being interlocutory and not appealable. The reason is that the order with respect to those is still in process of litigation here at this level. The parties will not be heard until Wednesday on their proposals and counterproposals with respect to the plan for a Department of School Security Services, and the draft order on the Office of Implementation is one that still has not been filed by me. I have put it aside while working on these findings of fact and conclusions of law that I thought would be filed on Friday. I thought they would be filed today, when I did not file them on Friday. I hope they will be filed today, but it may not be until tomorrow when they are filed, so that for those reasons, I do not plan to hear argument addressed to Paragraph 4, principally because I think the orders covered by that paragraph are interlocutory in nature.

I will now hear arguments as to the other paragraphs,

and would start off with counsel for the School Committee. Mr. Sullivan.

Mr. Sullivan: May it please the Court. Your Honor, my arguments are directed first of all to the scope of your order and secondly to your authority under the law to have entered those orders. Counsel for the School Committee on two separate occasions had submitted memoranda or briefs on [4] this question, on the issue of your authority and our questioning that authority. The first was filed on September 26, 1975. That was a memorandum of the Boston School Committee relative to the recommendations of the Civil Rights Commission. The other was filed on October 10, 1975, and that was a rebuttal brief of the Boston School Committee.

The citations and the arguments have already been presented to you. These questions, questions involving your orders of the ninth of December and as finalized last Friday, are of serious and novel nature. We feel that it is imperative that an appellate court review those orders because of their uniqueness, because of the breadth of their scope. Time is of particular essence, as I am sure your Honor appreciates.

As I stated last Friday, we are having a footrace here with mootness. The present school committee goes out of office on January sixth. If we do not have our day in appellate court, many of these issues, if not all of them, will be mooted. The force of your orders has the effect of bobtailing the term of office of elected officials. As of the date of your orders, they cease in very large areas to exercise the authority for which they were elected. You have taken from their administration the overseeing of the South Boston High School. You have enjoined them from making the appointments which they have statutory authority to make.

[5] You have entered into the area of local autonomy, long recognized in this commonwealth and elsewhere for elected school officials to administer the affairs of the schools. We feel that you have done so without sufficient basis. We feel that there is no precedent in law for what you have done. We feel that you, in this vital period, where we are faced with mootness around the corner, should not be the reviewer of your own acts, certainly in this area.

These orders have tremendous impact, as we all appreciate. The School Committee is stripped of its powers. A federal district court has entered into the area of schoolmastering, to the extent that you through your agents are administering the South Boston High School. We object to this procedure. We feel that it is constitutionally defective, and we plead for an opportunity to have these orders reviewed by a circuit court, and that such be done within a reasonable time, which reasonable time is now.

The Court: Well, let me ask a question, because I think it is material. Suppose the stay should be granted with respect to the appointments. It would seem to me — and I want you to correct me if I am mistaken — that the granting of a stay would simply open the way for the School Committee to make the very appointments which the Court has ruled should not be made. In other words, I see no difference between a stay and the merits in these matters. Either the School [6] Committee is going to be free to make these appointments or not. If there is a stay of the order granted, I see nothing to prevent the School Committee tomorrow from convening and making the appointments without the Court having entered the order on the desegregation of administrators or without the Court having reviewed and the parties having had a chance to talk in terms of the reorganization which was voted on the third of December, and so forth.

Do you distinguish between the stay and the merits here? I have difficulty doing so.

Mr. Sullivan: Well, it is very difficult to do so, your Honor, but the question of your authority in this area is so fundamental that it calls for an immediate review by a court higher than you are.

The Court: I agree completely. Don't have any misunderstanding. I have not in any remotest way nor will I in any way delay the processing of this appeal. It should go forward just as quickly as possible. I asked Mrs. Fitzhugh, of course, to expedite this, and we have it, and the papers, I assume, will be given to the Court of Appeals just as soon as possible, but to me, to grant the stay would moot the appeal. You say to keep it in effect would moot the appeal.

Mr. Sullivan: Yes.

The Court: I have a different view. What is wrong with my view that to grant the stay would open up the appointive [7] power and render the appeal moot?

Mr. Sullivan: Well, there may be other avenues of testing those appointments, but this has been a traditional power of the School Committee, and you are changing it. Your are changing their appointive authority, and therefore the urgency is more in the direction of their review and a stay from what you are suggesting.

The Court: Well, I did want your answer on that question.

Mr. Sullivan: Well, that is my answer.

The Court: Right. Well, does anyone else— I think Mr. Sullivan has finished. Mr. Pressman, are you going to speak for the plaintiffs?

Mr. Pressman: Yes, I am, your Honor. Could I inquire if there are any other arguments in support of a stay so all of those could come first?

The Court: Yes. I think that is a good idea. Yes, Mr. McMahon.

Mr. McMahon: I would only indicate, your Honor, that we would support Paragraphs 2 and 3 of the School Committee's motion.

The Court: Well, let me ask you, then, this question— it bothers me — that I asked of Mr. Sullivan. Stay, of course, does not here mean delay or impede in any way. The common ground is that the appeal will go forward as quickly [8] as possible. The question is, What is the status to be while the appeal is being processed? Are the orders that the Court entered to go into effect, or are they to be suspended or to be put in abeyance? Mr. Sullivan indicates that denial of the motion will moot the appeal. A premise, I think, of his argument is that the appeal could not be decided on the merits between now and the first of January, because the School Committee goes out of office on the fifth.

Well, it seems to me that if one assumes that the appeal could be decided on the merits before the first of January, then the rights of the School Committee could be preserved and there would not be mootness. Conversely, it would seem to me that if the Court suspended its orders, then the appointments could be made, and that would have the effect of mooting the case in the other direction.

Mr. McMahon: Your Honor, I would agree with your analysis as to Paragraph 1 of the School Committee's motion. My support is of only Paragraphs 2 and 3.

The Court: I see. Well, let me ask you a question, then about Paragraphs 2 and 3. Is there not, with respect at least to the transfers, a built-in stay, in the sense that the order does not call for the transfers to become effective until the second of January, in any event?

Mr. McMahon: That is correct, your Honor, but that—

The Court: And the Court of Appeals will have an [9] opportunity to continue or to order a stay— In other words, it is not as if these orders were effective tomorrow, and please consider that dimension in your argument, if you wish to make an argument.

Mr. McMahon: Your Honor, we would renew, if necessary, and even file separately an independent motion to the Court of Appeals to stay beyond January one the transfers and imposition of the receivership, but I do not think that questions of this kind and of such complexity in terms of their novelty and their depth can be decided by the Court of Appeals, as this Court of Appeals so carefully decides questions, before January one.

The Court: Well, I am sure you are aware, being in touch wtih the situation generally, that the operations of South Boston High School and the L Street Annex, as far as the operations in the balance of last week are concerned and the operations today are concerned, are under the control of the Federal Court in the most technical way.

Mr. McMahon: Yes, your Honor.

The Court: It is true that the Court has, for the purposes stated in its orders, ordered this temporary receivership, but I am unaware of any change in the operation of the school. I don't think there has been any change in the faculty or staff, or the conduct presence of law officials or other persons. No question that the order is effective [10] and the intention of the Court is, incidentally, to settle upon a new headmaster as soon as can be.

I don't want to lead you to an erroneous opinion or understanding here. Mr. McDonough, the temporary receiver, has made numerous inquiries and has made considerable progress in his efforts to select a successor to the building administrator at South Boston High, and I don't expect it is any— well, I expect I should note on the record that I conferred with Mr. McDonough for proably 45 minutes shortly before coming up here this afternoon.

So that is the situation. Do you want to argue further on the matter?

Mr. McMahon: No, your Honor, I don't think so.

The Court: All right. Anyone else now? Yes, Mr. Coleman.

Mr. Coleman: Yes, your Honor. The Administrators Association would also support the motion for a stay as regards Paragraphs 2 and 3. Particularly with reference to Paragraph 3, it is our opinion that the South Boston High School could continue to operate, implementing the Court's order to the fullest, with the administrative staff intact, and if the Court believes that it is neccessary for a receiver, we believe that administrative staff can work under a receiver.

We think that it is inappropriate, based upon the [11] evidence in this court room, to place the bulk of the public blame and fault on the administrative staff of South Boston High School for any failure to implement the plan that the Court may have seen or found, and therefore we believe that these orders are to be stayed pending review in the Circuit Court.

The Court: All right. Anyone else in support of the motion.

[No response.]

The Court: Apparently not. That clears the way for you, Mr. Pressman.

Mr. Pressman: This being a motion for a stay, an appropriate starting point is the standard that should apply with respect to a stay of an order of the District Court. The Court of Appeals addressed this question in an opinion on June 17th when a number of the parties here sought to stay the Court's Phase 2 remedy.

The Court of Appeals mentioned two standards. One of them was that the applicant must demonstrate that the harm to him if a stay is not granted outweighs the harm to the other parties if the stay is granted. The other factor mentioned is that there exists the probability that he, meaning the applicant, will succeed in his appeal on the merits.

Before getting on to discussing the motion and the [12] particular orders, there is another point that should be considered preliminarily, and that is the deference that the Supreme Court has indicated is in order when a district court has developed a remedy during the remedial phase of a desegregation case. We can recall that Brown and I did not discuss remedies. The court instead addressed a list of questions to counsel and other interested parties, including questions addressed to should the Supreme Court enter a decree or should the cases be returned to the district courts, and the Supreme Court decided on the latter process, specifically referring to the fact that the district courts would be closest to the situation, that there would likely be a need for further hearings, that the district courts would have the best understanding of the facts and the remedies needed, and that theme has been repeated in the subsequent cases, Swann, and the Montgomery County case before, and that principle we think is uniquely applicable here.

The Court has spent many days on hearings, becoming familiar with the facts of this matter, the problems of implementation, employing less rigorous remedies, and seeing first how they worked.

Now with respect to the motion, and the argument by the School Committee in support of the stay, we think it is plainly inadequate on the face. There is not one word about the comparative harms between issuing a stay and denying the [13] stay. All these orders rested on findings by the Court of irreparable injury to the plaintiff class, and the Court of Appeals has made it clear that there must be a showing with respect to the balance of harms, and that is not even suggested in the motion or argument by counsel.

Also, we think that the argument is defective with respect to showing some possibility of success on the merits. There is reference to some briefs that were filed some time

ago about a complete receivership, but there is nothing addressed to the specifics of these three orders before the Court, two of which are in writing and a transcript setting forth the Court's findings for these specific orders, so that we think that if just the argument of the committee is considered and the motion, the stay needs to be denied, but beyond that, we think that each one of these orders is plainly consistent with the Court's authority.

The first order we will discuss is the order imposing a temporary hold on the School Committee's ability to make appointments. In the first place, it needs to be pointed out that that is not an absolute bar on appointments. The order specifically refers to the authority to come to the Court to request acting appointments with respect to specific positions, and in one instance in which that was done, the Court allowed the appointments. At the last hearing, the Court said that at any point when there was a need, the [14] committee should make a specific request.

We think that this order is supportable on two grounds. First, in the June 21, 1974 opinion, the Court found that there was discrimination with respect to employing administrators. The Court found that the system of employing administrators carried forward the dicrimination with respect to hiring teachers, because teachers were the primary pool for appointing administrators. The Court of Appeals specifically, in our view, agreed with that rationale, so that we think that this temporary hold is justifiable to preserve the status quo with respect to the racial make-up of the administrative staff while the Court gives further consideration to the remedial proposals in that area, and we think that this kind of relief is similar to the relief upheld in the NAACP versus Beecher case by the Court of Appeals.

There what happened was the district court enjoined permanent appointments of firefighters pending develop-

ment of a validated exam, acting appointments could be made, and the Court of Appeals upheld that relief, and we think that this is a similar situation.

Secondly, we think that this order can be sustained based on the record of conduct here with respect to administrative positions of the majority of the School Committee since the June 21st order. That seemed to be the basis that the Court was giving for the temporary hold in the bench [15] ruling referring to the possibility that persons hostile to implementation of the plan would be put in many positions before the new committee was seated.

We can refer to a number of actions. There was noncompliance with the January 28, 1975 order with respect to appointing minority recruiters. There was a failure to appoint district superintendents under the May 10th plan until the Court specifically ordered it. There were problems during the past summer with salaries for persons who were working to implement the plan.

The position of safety coordinator remained unfilled for a period after Mr. McCabe was given other responsibilities. There were inadequate personnel for the transfer office. There was the problem we had recently with respect to the person designated to be in charge of security, and there was the slow pace that we all witnessed with respect to one minority administrator for South Boston High School, and we think that this pattern of obstructive conduct is a second and independent reason why the Court could put a temporary and limited hold on the authority to make appointments.

The next order that we wish to discuss is the order appointing the receiver for South Boston High School. What this does is to displace the authority of the School Committee for one aspect of the system, but we point out that it does [16] not do it by appointing someone totally outside the system to have the authority and to be responsible

to the Court. It puts in that place the person that was selected by the School Committee to be in charge of that district. We think that is a significant point.

We point out that this order rests on a clear finding of irreparable injury to the plaintiff class. The Court agreed with our motion that black students were not receiving the peaceful, integrated education to which they were entitled under the Fourteenth Amendment and the order. The Court did not agree with every word in our motion, but it made findings about assault on black students and racial epithets affecting them. There was a clear finding of irreparable injury.

In assessing the legality of that order, we think that the starting point is the Court's underlying authority. From Brown II on, the Supreme Court has said that federal district courts in desegregation cases would exercise all the traditional equitable powers. Thus, in Brown II the court said: "In fashioning and effectuating the decrees, the court will be guided by equitable principles." One of the traditional equitable principles is that a court of equity in some rare instances in an extreme situation can use the remedy of receivership. For example, in the Aldrich case, 151 Fed. 2d at 261, the Court of Appeals for the First Circuit said: [17] "The appointment of receivers in the case at bar was an appropriate exercise of the court's inherent equitable power."

Again, in Swann, the Supreme Court addressed the scope of the equitable power of the district court in a desegregation case. The court said: "The essence of equitable jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. In default by the school authorities of their obligation to proffer acceptable remedies, a district court has a broad power to fashion a remedy that will assure a unitary school system."

So the general language of the cases at least suggests broad authority of the district court to deal with the necessities of the situation, but the question can be asked and has been asked: Despite this broad language, is it nevertheless proper in any circumstances for elected officials to be displaced? Can this never be done? We say under the law that that is not the case, that in a rare case like this, where we have months, in fact, more than a year, of obstructive conduct, what the Court has done in a limited way is proper, and we rely on the following authorities:

In the first case, in the Swann case, the question was developing a segregation plan, and when the school authorities, who were elected, after numerous opportunities to present a plan, nevertheless did not present one that approached [18] legality, the court appointed experts, who were court experts, well, a court expert, who drew the plan which the court then adopted. This had the effect of displacing the elected authorities from one of their most important prerogatives, namely, deciding to which schools the pupils would go. That action was specifically upheld by the Supreme Court, and it has been done in other cases.

Second, we find support for the Court's approach in reapportionment cases. There have been a number of cases where, after the court gave the legislatures an opportunity to reapportion themselves, to develop a valid plan, and they nevertheless defaulted, the court then by itself or with the aid of a master developed a plan of its own. This principle is recognized and some of the cases are collected in Sixty-seventh Minnesota State Senate versus Beens, 406 U.S. at 195 to 200.

Furthermore, there seems to be a suggestion, particularly in the paper that was filed seeking a stay in the Court of Appeals, that what the committee has been doing mirrors the views of the electorate, and that somehow the committee can always do that without being displaced. Well,

that is just not the law at all. In another reapportionment case, Lucas, 377 U.S. at 736-37, there was a situation where the electorate had approved a reapportionment plan which the court found did not comply with the one-man-one-vote [19] requirement, and the court rejected the notion that that insulated it from attack, saying, "One's right to life, liberty, and property and other fundamental rights may not be submitted to vote, may depend on the outcome of no elections. A citizen's constitutional rights can hardly be infringed simply because the majority choose that it be."

So we say under these authorities that there is no absolute phohibition on displacing elected officials when their conduct is of the type that has occurred here.

The next question as to the validity of orders was, was there a need for them, is there some indication that the irreparable injury which the Court found could have been addressed by some remedy that does not exclude the School Committee from acting the part. We say that based on the nature of the problems and the performance of the majority of the School Committee since June 21st, the answer to that question is plainly no.

First, the nature of the problems. The Court found that there is a school in which more than a year into the plan there is not a peaceful, integrated education. What is required, someone has to evaluate very carefully the problems in that school, to think of a range of solutions, to consult with other persons about solutions, to implement solutions. No one can blueprint in advance exactly what the analysis is going to entail or what the solutions will be, but that is [20] the kind of effort that is needed, and it has got to be done by someone who wants to see a solution at the end of the tunnel also. The words and the deeds of the majority of the School Committee show that they are not able to participate in that kind of effort, and the plan, to use some familiar words here, that included them would not promise realistically to work.

Back in the beginning, on June 21st, the Court began with some general, affirmative orders. That just did not prove adequate to insure compliance. The Court had to repeatedly inform the majority of the School Committee that general remedial orders required that they do— every staff, large and small, and that they do a little thinking about the kinds of things that were necessary for the plan to work properly. In just one area where there were problems, and the Court repeatedly had to point out, the obligation was with respect to providing funding for the different programs.

The reason that general orders proved inadequate is clear from the words of the School Committee members when the Court invited them to court during the contempt proceeding. Two of the members said and in their answers to written questions that they would not do anything to supplement the plan. Well, the Court cannot issue an order that is as long as an encyclopedia, detailing every i that needs to be crossed— every i to be dotted and every t to be crossed. It needs to [21] rely at least to some extent on general orders, and when the School Committee members said they would not supplement the plan, they were in effect saying they would not comply with their obligation.

Later, we repeatedly heard about the need for direct orders. Well, as the Court stated when that occurred, the general order should have been enough for the members of the School Committee to meet their affirmative obligation under the Constitution. But then when there were specific orders, they did not work very much either. There was noncompliance with the order on hiring minority recruiters for many months. There was noncompliance with the order about submitting a plan on December 16th. There was noncompliance with the orders about appointing additional district superintendents, and there were several other specific orders that were not complied with.

Further, and this is, you know, one of the most significant points, and the point I have mentioned, it is simply not possible for the Court to issue an order that covers in advance every single thing that needs to be done. The Court in the order to Mr. McDonough has indicated a number of topics on which he should make reports, but it is not really possible for the Court and the experts in advance to say exactly what should and should not be done in each of those areas. Someone who wants to see the problem resolved [22] has to look into those areas with the will and the desire to resolve the problems.

The Court has done other things to try to avoid the day that was reached. Officials who have come to court to speak, to state their views, to express— to engage in a dialog with the Court have been permitted to do so: the mayor, several representatives, a member of the School Committee. There have been innumerable hearings where parties could raise pretty much anything they wanted to raise. The Court has sometimes inquired again and again about particular things: what was the progress being made; what was the progress in the School Committee taking a view on the hours, on the staggered hours of opening; what was the progress on appointing a black assistant at South Boston High School; what was the progress on giving a budget to the Office of Implementation.

Then the Court, when the Civil Rights Commission raised the point, asked for memos on recceivership, and the memos were on file for a while, while all of us hoped that some things would change.

Part of the problem is the attitude, the obstructive attitude, of some of the members of the School Committee. We remember that when the first draft of the instruction booklet was available, the School Committee's approach was to say how unworkable it was and then to announce that in a press [23] conference, rather than to see if that could be worked out first.

We have to remember that the School Committee had submitted a plan where the mechanism for assignment was far more complicated than the Court's plan, but when the first draft of the booklet was complicated, the approach was to publicize, oh, how workable this was, but it did not prove that way after some members of the staff and the experts worked on the booklet.

The Court, with a lot of precedent from other cases, appointed a citywide committee. One day at a School Committee meeting on June 4, 1975, Mr. Kerrigan discussed working with the committee. First he said, "Well, I would rather work with syphilis." Then he corrected the record. He said, "I'd rather work with gonorrhea." Then later on he corrected it again; he said "I'd rather work with someone with bubonic plague."

Well, those are some of the problems that the Court has been faced with and have forced the Court where it is now, to a remedy that is strong but, we say again, within the Court's authority. There are many other instances of obstructive conduct and they don't have to be mentioned, but they are detailed in the memo that we filed on receivership on September 26th.

The Court did not seek the level of involvement of [24] these multiple teams that we have had to have. The very first time we have been able to find when counsel for the School Department brought up the question of how far the Court was going to get into the daily operations of the system, the Court said, on July 23, 1974, "Not one fingernailful than absolute necessary."

Later, when the members of the School Committee were here for the contempt hearing, the Court, in addressing Mr. Kerrigan, said: "Once there is a plan, can the Court

anticipate your cooperation? because— or do I have to say, 'Do this, do this, do this,' because I cannot do that." Then later on again during the summer, the Court was repeatedly saying things like that.

In sum, we think that these facts and the law made what the Court did inevitable and necessary.

Now, a little more with respect to the legal support and legal authority for what the Court did. We have mentioned the general language of Brown II and Swann. There is also the case of Turner 1. Goolsby, 255 Fed. Supplement at 724. To be sure, the members of the school board there were not elected but we have previously argued that there is not a material distinction when the facts are like the ones here. There the receiver developed a desegregation plan; later, at the court's request, investigated claims of in-school discrimination; considered the need for remedial programs. There the receiver [25] was the state Superintendent of Education. Here the receiver is someone from within the school system, appointed by the members of the School Committee, my recollection is, unanimously, with one abstention, to be in charge of that area.

A second case that we think furnishes support is United States versus Board of School Commissioners of Indianapolis, 503 F.2d 75 to 78. There the court, after the school committee— school board defaulted in submitting a plan, "temporarily assigned the school department's planning staff to assist the court experts" which the court had appointed.

There are other authorities that we think are pertinent, and they are in our receivership memo at pages 65 to 67.

Now with respect to the order transferring Dr. Reid and the other administrators and Mr. Perdigao, we point out that they will be having the same pay and very similar positions. We think under the case law that applies to the remedial phase of school desegregation cases that the Court

need not make a finding of intentional wrongdoing each time it takes action. The question is one of effect, and here the Court has found that the plan was not being effectively implemented, many months after desegregation had started, and we think under the cases that say effectiveness is the test, the Court can replace the persons under whom the plan has not been successful without some finding that they intentionally [26] engaged in wrongdoing, and we rely on the Davis case, 402 U.S. at 37, and White v. Emporia, 407 U.S. at 459 to 462, in taking that position. We point out that these are not cases about transferring administrators, but they do, we believe, establish the principle that in the remedial phase of a desegregation case, the question is effect.

With respect to transfer of power, for a long time courts have directed transfers of staff to achieve desegregation. We think that this is authority for transferring them for another purpose if it is necessary to effectively implement the plan. We think that the Court could conclude whether or not the administrators engaged in intentional wrongdoing that they would be so associated with the noncompliance, the lack of adequate implementation of the plan, for a number of months, in the minds of all the students in the community and the teachers there that the Court could conclude that people without prior involvement in the schools should make a fresh start toward implementing the plan.

We think that the arguments that we have made with respect to the administrators apply a fortiori with respect to Mr. Perdigao, based on the specific findings made by the Court with respect to his situation.

In conclusion, our view is that each of the orders was based on specific findings of irreparable injury; that no showing whatsoever has been made that the harm to the students [27] if stays are granted would be less than the harm to the officials if the stays were not granted; that

these actions are plainly within the authority of the Court when the facts are what they have been since June 21, 1974; and we therefore say that the stay should be denied.

The Court: [To Mr. Sullivan] Well, there might be someone else before you. We have rebuttal. I don't know if anyone else wants to be heard.

Miss Taylor: Briefly, your Honor.

The Court: Miss Taylor.

Miss Taylor: We would join the plaintiffs, your Honor, in opposing the stay of the order pending appeal. El Comite maintains that the minority children of Boston have a right to safe, desegregated education, that immediate action of this Court is required in order to assure that. Hearings in this court have determined that they are not receiving safe, desegregated education at this time.

We would agree with the plaintiffs regarding the standard stated by Mr. Pressman. We feel that the irreparable harm suffered by the School Committee in losing its right to continue in office is by far outweighed by the right of minority children to equal education.

We would also point out that the appellate courts have continuously invited the district courts to exercise broad equitable powers in fashioning remedies in desegregation [28] cases. At the chance of sounding simplistic, we would argue that this Court has an obligation to formulate a plan that works and one that works now. We would therefore oppose a stay at this time.

The Court: All right. Yes, Mr. Sullivan.

Mr. Sullivan: If your Honor pleases, there are two things mentioned by counsel for the plaintiffs, one of them having been mentioned by the Court last Friday. The Court and counsel for the plaintiffs seem to share the view that the sentence contained on page 2 of the order suspending appointive power of the School Committee remedies another otherwise severe situation by providing that act-

ing appointments to particular positions may be made, subject to prior court approval.

I disagree with that opinion, because the elected public officials are supplicants. They have to come to the Court. It is the Court who makes the appointment. The Court retains an imprimatur and takes it away from the elected officials. Whether or not that language appears to be a modification, in effect it is not.

Another thing—

The Court: Before you get to the next thing—

Mr. Sullivan: Yes.

The Court: —what did you make of the asterisk, which I hoped would answer that point to some extent, and [29] that is that the Court does not want to learn the identity of people. If it is a position that requires filling, such as the people who are working on this vocational education plan, I am not concerned about who it is. So do you not distinguish between a court saying a position can be filled and saying put Mr. So and So in that position? which I think is a different story.

Mr. Sullivan: Not really. Not when it is a usurpation of the rights of elected officials. I respectfully disagree with your Honor.

Another thing that was expressed by counsel for the plaintiff was, Well, it would be different if someone outside the system were appointed as receiver. That type of salve in no way calms the sting of the wound. The fact of the matter is that the elected officials have been removed, their authority has been destroyed, and whether one comes from West Roxbury or Timbuktu to be the receiver makes no difference.

Counsel for the plaintiff has argued lengthily and given us a history of this litigation from his or the plaintiff's point of view. However all-inclusive his argument may seem to have been, it does not face up to what I consider the narrow issue before the Court: the scope of your

powers and your— the scope of your orders and your authority to render them. He talks about reapportionment cases and the like. [30] I would prefer to talk about a case dealing with an implementation order, Keyes versus School District Number One, in Denver, found at 521 Federal 2d, and I— This case—

The Court: Do you have the page? If you have it there, I will note it.

Mr. Sullivan: Four sixty-seven, I believe.

The Court: All right. Is this before or after the Supreme Court decision, if you know?

Mr. Sullivan: After.

The Court: All right.

Mr. Sullivan: Now, this decision, it seems to me, narrows in on the question of the authority of a judge in an implementation order, and I would like to take a little time, if I may, your Honor, to quote from that decision.

The Court: Let me ask one other thing, if I may.

Mr. Sullivan: Yes, your Honor.

The Court: Does the date appear at the beginning of the opinion?

Mr. Sullivan: I don't have the very first page.

The Court: All right. Well, don't—

Mr. Sullivan: Those are headnotes, and I did not carry that—

The Court: All right. Fine.

Mr. Sullivan: —1975 case. That much it is.

The Court: All right.

[31] Mr. Sullivan: But the month I cannot give you.

The Court: All right.

Mr. Sullivan: Now that decision quotes the United States Supreme Court in the Milliken versus Bradley case and others. It said: "Direct local control over decisions vitally affecting the education of children has long been thought essential both to the maintenance of community concern and support for public schools and to the quality

of the educational process." Further, "Local control permits citizen participation in the formulation of school policy, and encourages innovation to meet particular local needs. Educational policy, moreover, is an area in which the courts' lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at state and local levels."

From the same page, 482, "We believe that the district court's adoption of the Cardenas plan would unjustifiably interfere with such state and local attempts to deal with the myriad economic, social, and philosophical problems connected with the education of minority students. Instead of merely removing obstacles to effective desegregation, the court's order would impose upon school authorities a pervasive and detailed system for the education of minority children. We believe this goes too far." And I believe that your orders go too far.

[32] The Court: All right. Well, yes.

Mr. Pressman: Yes. I would just like to make a few comments about the Keyes case.

The Court: All right.

Mr. Pressman: The question was the permissibility of the desegregation plan approved by the district court, and the Court of Appeals held that in two respects, the district court had entered provisions that were not related to particular constitutional violations found by the district court, were beyond its authority because they did not relate to the segregation of the system which he had found. Here we have pointed out in our argument that what the Court has done is to deal specifically with impediments to implementing its desegregation order.

The Court: Well, I will decide this in a moment— I mean in a few minutes, after taking a brief recess, because I think a quick decision is consistent with everyone's determination to have all these questions resolved speedily.

Before taking a recess, which will be between five and ten minutes, and then I will come back and state the decision, there is a housekeeping matter I want to ask about, or I might otherwise forget to, for Mr. Sullivan. Is there an arrangement to be made whereby Miss Fahey's counsel is to be compensated, if you know? That is something you were going to—

[33] Mr. Sullivan: —when the committee holds its next meeting, your Honor.

The Court: All right. Thank you, then. We will take a short, five-minute recess.

[Recess.]

AFTER RECESS

The Court: The ruling is that the motion to stay is denied in all respects. I have already stated that I would not entertain the motion with respect to Paragraph 4, which I thought to be interlocutory, and the parties have not argued that aspect of it.

With respect to Paragraph Number 1, about the moratorium on appointments, I feel that the plaintiffs, rather than the defendants, who are here the moving parties, have demonstrated a probability of prevailing on the merits on appeal. On the matter of balancing harm to the parties, that is, to the plaintiffs from granting of the motion and to the defendants from the denial of the motion these positions which cannot now be filled are not all of the positions. They are only certain high level positions, and they have been vacant, in many instances, for years. I cannot see any harm to the School Committee if they should remain vacant for another few weeks.

Were the motion to be granted with respect to Paragraph One, it would, I believe, have the effect of defeating the [34] Court's order of December 9th. In this instance, I am unable to distinguish between the merits and the motion to stay, and I think that to grant the motion to stay with respect to Paragraph One would be equivalent to a reversal

of the Court's order entered December 9th, and I simply am not prepared to reverse the order, because I do not think it should be.

Paragraphs 2 and 3 are different. They are the paragraphs that appoint a receiver for the South Boston High School; that is Paragraph 2; and then the one that orders that certain personnel at the school, the building administrator and his assistants and the football coach, be transferred. There agan, the Court feels, first, that the defendants have not shown a probability of succeeding in their appeal. In my view, those orders are not essentially different from dozens of provisions in the desegregation plan itself.

The desegregation plan interferes at many points with the autonomy of the School Committee. I do not have the plan in front of me, but some of the many ways in which the authority of the School Committee is superseded in matters never thought to be the prerogative of a court would be the order that each school building must have a headmaster or principal, or, called in the plan, a building administrator.

We will recall that over the years, it was the practice to have an elementary school principal in charge of a group of schools. He might be principal of as many as four or [35] five, even six schools that were located fairly close to one another. The Court accepted the masters' recommendation that if there was to be accountability in the school system, and other benefits, which would be necessary if the plan were to work, there should be a person in charge in each building, and the Court so ordered.

The Council of Principals, the drawing of certain district lines, all sorts of orders in the plan supersede and interfere with the normal prerogatives of the School Committee, so I look upon this order transferring the administrative chiefs at South Boston and putting the school in receivership as not different essentially from an order that

could have been put into the plan along the following lines: Unless certain changes are accomplished at the end of six months from today, the persons responsible for affecting those changes will be transferred. I do not think, at least in my opinion, that there could be much doubt of the validity of a provision such as that in the plan, and I think this is comparable.

A different way of putting it is that, as I understand the law, the obligation of the defendants to implement the plan is a continuing obligation, and an order such as is at issue in Paragraph 2 and 3 is simply a refinement of the Court's general order which was given at the outset of the case back in June of 1974, when the defendants were ordered to take all affirmative steps necessary to eliminate what is [36] called the vestiges of past segregation. I do not think it is within the Court's power, and I do not consider it to be that extraordinary.

Moving now to the question of balancing the harm to the respective parties, that is, comparing the harm to the plaintiffs from allowance of the motion and that suffered by the defendants by its denial, I consider that the equities support the position of the plaintffs. The need for a change in administration at South Boston High School was, in my opinion, urgent, very urgent. Attendance there has been declining at such a rate that if the Court did not step in and take action, in my opinion there would not be much left at South Boston High School to keep open if the matter were permitted to go on without drastic change.

The attendance there in the middle of October was 580. In the middle of November it was 540. At the beginning of December it was 476. Down, down, down. The whole question as to whether the place should be closed would have become not completely moot but close to moot, it seemed to me, unless some affirmative action were taken immediately. Furthermore, the Court has an obligation, as I see it, to take action to prevent escalation or resumption of the turmoil that has interfered so substantially with the education of

all the students at that school. I am not talking just about the black students; I am talking about the white students equally; [37] and the only way that I felt that could be achieved was to take the steps that were taken.

I see no harm to the School Committee from a change of administration in the South Boston High School. Intense efforts are being made right now to help the situation there, and the purpose of the temporary receivership is going to be more than just the change of building administrator; it is going to be a continuing attention on South Boston High School to upgrade the facility there and to bring to bear all of these community resources which the plan, that is, the student desegregation plan, establishes for the benefit of all of the children at that school.

I am not unaware of the harm to the individuals who are ordered transferred, and that is just one of the prices, and heavy prices, that have to paid to make this case and these remedial orders go forward, but so far as the harm to the individuals is concerned, I have the feeling that that has done about as much as could be. By that I mean there is no order now that could be made in the way of granting a stay of the orders that could alleviate the feeling of disappointment or injustice which the individuals who have been ordered to be transferred feel.

I think that lastly the order does have a certain built-in delay in it, meaning that the transfers are not to become effective until the second of January, or whatever the [38] first school day of January is in 1976, and the rights of the individuals will be preserved in the Court of Appeals, which without any doubt will entertain a motion for a stay and act upon it between now and January second.

So for those various reasons I think that the defendants' motion to stay must be denied, and it is so ordered.

I think our next hearing is Wednesday. Yes. So we will just recess.

[Thereupon the hearing was concluded.]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Miscellaneous No.

TALLULAH MORGAN, ET AL,
PLAINTIFFS,
v.
JOHN J. KERRIGAN, ET AL,
DEFENDANTS.

BOSTON SCHOOL COMMITTEE'S FURTHER MOTION FOR A STAY

The School Committee of the City of Boston hereby reiterates its Motion for a Stay, pending appeal, of implementation of orders set forth in the School Committee's Motion for a Stay filed with this Court on December 10, 1975, (a copy of whch motion is attached hereto and marked "A").

In support hereof, the School Committee states:

1. The District Court at a hearing on December 15, 1975, denied in all respects a Motion for a Stay filed therein as to the orders enumerated A, B and C in the School Committee's Motion for a Stay filed with this Court. With respect to order enumerated D in the Motion for a Stay filed with this Court, the District Court stated that it would not entertain a Motion to Stay since, in its opinion, the order was interlocutory.

2. The order enumerated as A in the Motion for a Stay filed with this Court has been reduced to writing and is attached hereto (marked "B").

3. The order enumerated as B and C in the Motion for a Stay filed with this Court has been reduced to writing and is attached hereto (marked "C").

4. The transcript of the hearing of December 9, 1975, in the District Court (at which the instant orders were en-

tered from the bench) has been produced by the court reporter and is attached hereto (marked "D").

The District Court, in its remarks from the bench on December 9, 1975, made reference to certain portions of the plaintiffs' motion to close South Boston High School, a copy of that motion without attachments is attached hereto and marked "E."

By its attorneys,
DiMENTO & SULLIVAN
s/ JAMES J. SULLIVAN, JR.
James J. Sullivan, Jr.
100 State Street
Boston, Massachusetts 02109
(617) 523-5253

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 72-911-G

TALLULAH MORGAN ET AL.,
PLAINTIFFS,
v.
JOHN J. KERRIGAN ET AL.,
DEFENDANTS.

SUPPLEMENTARY FINDINGS AND CONCLUSIONS ON PLAINTIFFS' MOTION CONCERNING SOUTH BOSTON HIGH SCHOOL

December 16, 1975

GARRITY, J. On December 9, 1975, the court entered various orders on plaintiffs' motion for further relief concerning South Boston High School, following a week of evidentiary hearings which ended on November 28, including an order that the school be placed in temporary receivership. On December 9 the court dictated numerous findings of

fact and conclusions of law upon which its orders were based, but time did not permit the statement of all of the court's findings and conclusions and it was stated that these additional ones would follow. The court believed the need for the orders entered on December 9, especially the moratorium on appointments to key positions by the lame duck school committee, was urgent and could not await a complete contemporaneous memorandum of decision. The findings which follow deal principally with conditions observed by the court on two visits to South Boston High School and its determination that a change in the leadership and programs at South Boston High School is essential to implementation of the student desegregation plan dated May 10, 1975, in particular the provisions at pages 1-4.

The legal underpinnings of the court's order appear in its memorandum of decision dated June 5, 1975, especially the parts entitled "Preventing Continuing Injury" beginning on page 29 and "Multiplicity of Measures" beginning on page 39. The court also relies upon the legal precedents and principles cited in the August 1975 report of the United States Commission on Civil Rights on desegregating the Boston public schools, at pages 62-64.

With the court-appointed experts, who are the Dean and Associate Dean of the Boston University School of Education, and his law clerk, the court made two unannounced visits to the school, the first on Wednesday November 26, 1975, and the second on December 2, staying at the main building from about 7:30 a.m. to 9:30 a.m. on the first visit and from about 10:15 a.m. to 11:30 a.m. on the second. On November 26 the court spent about a half hour at the L Street Annex after leaving the main building. Attendance at the n.ain building on November 26, which was the day before Thanksgiving, was reported to be 271 white, 106 black and 25 other minority students, for a total of

402. On December 2 the reported figures were 337 white, 146 black and 27 other minority, for a total of 510.[1]

On both visits the court was taken on a complete tour of the building by the Assistant Headmaster for mathematics and looked in on classrooms, met teachers and students and observed students changing classes. On the first visit the court witnessed the entrance of students through the metal detecting devices which have been set up in the lobby of the school. On the second visit the court saw students at lunch at three of the six daily cafeteria sittings. The court met and spoke briefly with several administrative aides and law enforcement personnel and other personnel at the school, including the nurse, cafeteria employees and clerks. The number of State Police troopers stationed inside the school was approximately 90, of whom 2 were black. The number of transitional aides was approximately 42, of whom 15 were black.

The central impressions of the court as a result of its visits were that the services being afforded the students were primarily custodial and only incidentally educational and that the situation in the school was characterized less by racial tension, or indeed by any sort of tension, than by a pervasive lassitude and emptiness.

At an evidentiary hearing on the afternoon of the court's first visit, the court described the small numbers of students in many of the main building's 29 standard classrooms and 27 other learning stations such as shops, gyms and laboratories. On our second visit we counted 8 classrooms which were completely empty, of which only 2 were empty due to their being in the process of remodeling. More than half the remaining classrooms appeared to contain 6 or fewer students. The reported total attendance on December 2 was 510. However, making allowance for between 30

[1] On November 18, 1975, as to which the defendants had filed, previous to hearing the plaintiffs' motion, a detailed breakdown of attendance by race, grade and sex, attendance at the main building was 371 white, 139 black and 30 other minority, for a total of 540.

and 40 mechanical drafting students who were away from school on a field trip, the court and its law clerk and the two experts were in agreement that the number of students in attendance was substantially overstated. As for teachers, the roster of names and addresses filed by the defendant school committee at the outset of the hearing on plaintiffs' motion lists 100 teachers and 6 administrators. However, nowhere near 100 teachers could be found on the premises during the court's visits. On the second visit, when 99 teachers including 6 substitutes were carried on the roll, we made an unsuccessful effort to locate clusters of teachers not then teaching or present in corridors, storerooms, shops or laboratories; only a total of ten teachers were in the two teacher lounges at the time. Additionally, some classes were being conducted not by teachers but by aides, thus further reducing the number of teachers to be seen. During the testimony, a faculty meeting on October 22 was described and it was stated that about 40 faculty members were in attendance. This testimony corroborates the court's impressions that on both visits the number of teachers listed in the teachers' roll as being in attendance on those days was substantially overstated.

In the classrooms, with perhaps a half dozen exceptions, an inconsiderable amount of instruction appeared to be in progress. Granted, some aspects of teaching are impossible to observe or gauge in a brief visit and the court did witness observable instruction in progress in some classes, such as chemistry and the sheet metal shops. However, in most classrooms there was no dialogue between teachers and students nor test-taking in progress and most students appeared to be paying little if any attention to the teachers.[2] In several classrooms students were found standing, or

[2] At the evidentiary hearing a supervisory employee of the school department testified that these are the indicia he uses in determining whether education is going on.

seated on desks or tables, rather than at their desks or in chairs. We observed a student in the front row of a classroom with his head on his forearm, apparently sleeping, and saw him in the same position a minute or two later, although his teacher was in the front of the room within a few feet. Many students appeared to be without books or other teaching materials. The boys' gym class on both visits consisted of from three to six boys shooting baskets at a basketball hoop at either end of the gym. On the court's second visit, a substitute teacher was present in the boys' gym, who said he was helping the aide with the class. Despite the availability of empty classrooms, students on study periods were sent to one of the two low-ceilinged, basement cafeteria rooms where about ten were observed seated at picnic-type tables, on attached wooden benches without back supports, while cafeteria workers were setting out food at the counters at the end of the room. On the first visit a few students were in the library, and on the second there was but one student, who was being tutored by a Youth Service volunteer.

Everywhere but in the classrooms, laboratories and shops, security personnel predominated. State troopers, efficient and impressive, were in every corridor. Transitional aides generally stood around doing nothing, except that some sat outside lavatories presumably to protect students wishing to use them. Aides need have no particular qualifications, not even a high school diploma, and have had no special training but for a talk or two; they wear no uniforms; with few exceptions the white aides, who outnumber the blacks by more than two to one, come from South Boston and the black aides come from areas in Community District 6 from which the black students are bused. Administrators and teachers who were not in classrooms also stood about the corridors keeping a watchful eye on the students. A number of other personnel were present, such as volun-

teer tutors and employees of the Youth Activities Commission. Except for the State Police, who were ready but not uneasy, the corridor contingent acted as if trouble were expected. At one point we ascended a staircase quickly and met two aides at the top of the stairs, obviously anxious and alert; one explained that the sound of quick footsteps on the stairs was cause for alarm.

Generally speaking, except for the special needs and bilingual classes, the whole place was devoid of the youthful spontaneity that one associates with a high school. It was not just a matter of students of one race not speaking to or paying attention to students of another race, but of their saying little and seeming to pay little attention to fellow students of the same race. The students appeared to be calm compared to many of the non-uniformed personnel; nor did they seem inclined to exchange hostile glances or prone to take offense. They simply seemed to be the victims of constant cynical surveillance, unconcerned, uninvolved and cowed.

The court's visit to the L Street Annex, a remodeled wing of a municipal bathhouse to which about two-thirds of the ninth graders have been assigned, was too brief to warrant detailed findings and conclusions. Generally it showed considerably more vitality than the main building, with dialogue or demonstration or test-taking or other learning process observable in most of the classrooms that we had time to look in on. Another difference was that security personnel were not omnipresent.

Turning to findings apart from the court's observations on its visits to the school, attendance at the main building is lower than at any other high school in the city. As of October 17, 1975, 891 students had enrolled at the main building, 542 white, 315 black and 34 other minority. Of total enrolled students, only 61% attended on November 18, 1975 (a sample day for which complete breakdowns by

grade, race and sex were filed), 45% on November 26 and 57% on December 2. The percentage of enrolled white students who were in attendance exceeded the corresponding percentage of black students on all three days: November 18, 68% of enrolled white students attended, and 44% of blacks; November 26, 50% of whites and 34% of blacks; and December 2, 63% of whites and 47% of blacks. The breakdowns by grade for November 18 showed that the lower the grade, the lower the percentage of enrolled students in attendance, as follows: 9th grade 39%, 10th 59%, 11th 65% and 12th 73%. Evidently students in their early years at South Boston High were being "turned off" in greater numbers than those closer to graduation, and black students more so than white.

Other figures paint an even darker picture. The 891 students now enrolled at South Boston High School comprise but 70% of the 1280 students initially assigned to it, the lowest percentage of projected student enrollment actually enrolled at any high school in the city. Similarly, actual attendance as a percentage of actual enrollment at the South Boston High School main building, is usually only 60%, a figure lower than any district high school, lower than all but Boston Trade High School, and substantially below the citywide figure of 86%. Furthermore, figures appearing in the preamble to a plan for a department of school security services filed by the superintendent on November 26 show that the main building at South Boston High School has the highest rate of student suspensions of any school building in the city, 357 suspensions per 1000 students. The L Street Annex has the second highest rate —297 suspensions per 1000 students, compared with the average suspension rate at all high schools in the city, including South Boston High School, of 47 suspensions per 1000. Total suspensions at both South Boston High buildings equalled nearly 49% of all suspensions of high school

students in the system. This combination of the highest suspension rate and the lowest attendance rate invites an inquiry whether suspensions are ordered at South Boston High School more readily and automatically than at other high schools and, as a result, students are deterred from attending school.

South Boston High School remains an identifiably white school, especially at the main building where administrative personnel, including assistant headmasters, librarian, nurses, building custodians, clerk-secretaries, attendance supervisors, and cafeteria managers and attendants—a total of approximately 45 persons—do not include a black or other minority employee. Of the total of approximately 90 state police troopers stationed inside the school, 2 are black. Of 100 teachers, 7 are black including 2 physical education teachers and the music teacher—the school has no band or orchestra.

The white identifiability of South Boston High School is also shown by the 1975-76 handbook, received in evidence as exhibit 31, that is given to every student and mailed to the parents of all registered students. From its opening sentence on page 3, "South Boston High School opened its doors to students of the Peninsula area in September, 1901", to its concluding sentences on page 44, "Dogs are a nuisance and a potential danger to all. They do not belong on school premises.", it is clear that in the opinion of the administration the school belongs only to the white students residing in the easterly part of the district which it serves. Nowhere is reference made to the fact that the school is in a period of transition from an all-white school to one which black and other minority students have been assigned because new district lines have been drawn and it is the only high school serving the district in which they reside. Nowhere do the words "black" and "Spanish-speaking" appear except in a bald description on page 43

of Multi-Ethnic Councils in terms of their having been ordered by the United States District Court, District of Massachusetts. The opposite page describes the high school Home and School Association and sings its praises in extravagant terms, as follows, "All families are welcome to join the Home and School Association . . . [which] sponsors activities and programs of both a social and educational nature during the school year. . . . Members of the Home and School Association are urged to take an active part in school affairs that are of mutual concern to parents and the faculty of the school. Officers of the Home and School for the year 1975-76: President, Mr. James Kelly [and two other offices and names]." The implication of the handbook is that the high school's Home and School Association is a parent-teacher type organization interested in the high school curriculum and activities. Actually, membership in the Association is open not only to parents but also to "friends" of the school and, of the 14 officers and executive board members of the Association, only 2 are parents of children enrolled in the school! Its principal if not exclusive activity for the past two years has been opposition to the court's desegregation plan. Together with the South Boston Information Center, whose purpose is to correct distortions in news about public schools released by the school department and printed in the daily press and whose president happens to be the same Mr. Kelly, the Association has sponsored white student boycotts in violation of state law. See Mass. G.L. c. 76, § 4. Plaintiffs have shown *prima facie* that the Association[3] is a home-

[3] The Association described is the South Boston *High School* Home and School Association and is to be distinguished from the Home and School Association of South Boston, which is part of an alliance of district associations which has participated constructively in these proceedings, represented by Thayer Fremont-Smith, Esquire, and whose president, Mrs. Marie Clarke, serves on the executive committee of the Citywide Coordinating Council appointed by the court.

owners' or taxpayers' group concerned about things other than the content and quality of the education being offered at South Boston High School.

The school is surrounded by evidence of racial hostility. The word "Resist" is written in large lettering with white spray paint on the south doors of the main building, and the word "Never" is written with black paint in one to two foot lettering on one wall of the L Street Annex. The word "Nigger" is written in one foot letters with white paint on a lamppost on the street adjacent to the school. Racial slurs are painted on the pavement at most street intersections near the school. Virulent handouts have been distributed to white students en route to school, e.g.,

> "WAKE UP AND START FIGHTING FOR YOUR SCHOOL AND TOWN. ITS TIME YOU BECOME THE AGGRESSORS . . . DONT BE SCARED BY THE FEDERAL OFFENSE THREATS. A FIGHT IN A SCHOOL ISNT A FEDERAL OFFENSE . . . BE PROUD YOU ARE *WHITE* AND FROM SOUTHIE AND SHOW EVERYONE THAT THIS IS HOW YOU ARE GOING TO KEEP IT NO MATTER WHAT."

When a black assistant football coach, a former outstanding player, was temporarily assigned to the school in an aborted effort to integrate the all-white football team, a handout was addressed to the players stating in part,

> "They make fools out of you by FORCING you to accept a Black Assistant Coach which is part of their plan to take our school. But worse than that you make fools out of Southie and you don't care. If you cared at all or had any Balls you would demand they get rid of the Black Coach and you wouldn't play until they did at least you'd be doing your part."

White parents who have not shunned organizations, e.g., Racial Ethnic Parents' Councils, established by the court

to ease racial tensions have been threatened and intimidated by repeated slashings of the tires on their automobiles, bricks thrown through windows of their residences, etc. At the conclusion of the evidentiary hearing on plaintiffs' motion, the court dictated to the court reporter various findings on events in South Boston related to desegregation of its public schools, in the form of adoption of specified paragraphs of factual allegations made in the motion. Repeating them in this memorandum would serve no purpose.

The student desegregation plan ordered in these proceedings on May 10, 1975 provided at page 2, "There shall be no segregation of students within schools, classrooms or programs in the school system", and at page 3, "All extra-curricular activities and athletic programs shall be available and conducted on a desegregated basis." Yet racial segregation persists at South Boston High School. Detailed oral findings were made in open court on December 9 regarding the unsuccessful efforts of black students to join the football team; they will not be repeated. Black students, all of whom are bused, must enter school in the morning before white students are allowed in. There is no administrative policy as to seating arrangements in classrooms, the matter being left up to the individual teacher, so black students all sit on one or the other side of the room or all toward the front or rear. A plan to have desegregated assemblies, by having homerooms sit in assigned rows, is, according to the only testimony as to its implementation, not being enforced. Students of separate races sit at separate tables in the cafeteria at lunchtime; no effort is made to "break the ice" between the two groups such as by having teams of white and black aides eat together; on the contrary, a black girl taking a seat at a cafeteria table at which some white girls were already seated was reprimanded by the building administrator for having made a "provocative move."* The black girl had previously testified that she did this because there was no room for her at an adjacent table at which her black friends were seated. When fights or disturbances occur, participants are sent to segregated "holding rooms" located off the main lobby of the building. These rooms, in effect isolation cells, are approximately fifteen feet long and eight feet wide with ceilings ten to twelve feet high. There is a row of four to six chairs permanently affixed to the floor in each room, with folding seats. There are no windows. The large, single door to each room is solid wood and is cut into independent top and bottom sections. During classes, only the bottom half is closed. Between classes, both sections are closed and the students within have no visual contact with the corridor. The air inside the holding room is stale and, especially in the white holding room, is permeated with odors from the gymnasium underneath. While both white and black students are sent directly to the holding rooms following infractions of school discipline, white students who are suspended may leave the building and walk home. Black students, on the other hand, are confined, sometimes for hours, until a ride to the westerly side of the district becomes available. At the end of the school day at 1:50 p.m., black students must clear the school and depart on their buses before the white students may emerge.

Part of the problem at South Boston High School has been the attitude of the faculty as a unit toward the changes that have accompanied desegregation. Without question, many individual teachers have performed superlatively under the most harrowing circumstances and their

---

* The testimony at the evidentiary hearings has not yet been transcribed, the parties not having ordered "daily copy" from the court reporter. Therefore the court is of necessity relying on its incomplete notes and recollection, as well as those of its law clerk. Any errors in quotations will be corrected before sending this memorandum to the printers.

students and the community will be forever indebted to them for their dedication and fortitude. As a unit, however, the faculty has, in Dr. Reid's phrase, felt "put upon" by desegregation, and this attitude has impeded integration of the school. The details of one such instance follow. On October 9, the day after the black students caucused, presented a list of grievances and refused to leave their buses, the Citywide Coordinating Council (CCC) established from its membership an integrated five-member mediating board designed to help resolve disputes and ease tensions. The services of the mediating board were offered to South Boston High School in a meeting with Dr. Reid and the faculty senate on October 14. The faculty senate voted three to two to recommended the services of the board to the entire faculty. On October 16 the full faculty tabled the question of accepting the offer of the mediating board and invited the board to meet with the faculty on October 22. On that day, the board members appeared but no action was taken by the faculty, only forty of the approximately 100 faculty members having come to the meeting. On October 23, the proposal to accept the mediating board's services was rejected at a meeting attended by from 70 to 75 faculty members. On Friday morning, October 24, heavy fistfighting broke out in the worst racial confrontation of the school year; racial violence had erupted at a football game the previous afternoon. The students were dismissed during the noon hour and the building administrator called a meeting of the entire staff. The following partial account of the meeting appears in an affidavit[4] filed by a young but well experienced and credible white substitute teacher who attended the meeting:

[4] The substitute teacher, Kenneth R. Brociner, testified; but his testimony has not yet been transcribed. Hence this use of his affidavit, which was filed pursuant to the court's notice of hearing that plaintiffs' motion would be heard mainly on affidavits. Mr. Brociner's testimony was consistent with the statements quoted from his affidavit.

"I reported to the office and was told that I should attend the faculty meeting at 1:00 p.m. I went to the faculty lunch at 12:30 p.m. In the lunchroom I observed that white teachers were laughing and engaging in mock fights among themselves while the black teachers present appeared subdued. We all went to the auditorium for the faculty meeting. Dr. Reid stated that he was to meet that day with Dr. Fahey and he was sure that he would be asked for the faculty's opinion on closing the school. A discussion of problems at the school ensued. I was surprised that there was no discussion of the racial nature of the incidents of the day. A black teacher stood up and suggested that there should be more black teachers, administrators and aides in the school. His demeanor was non-belligerent. After he spoke a white teacher spoke against his position stating that 'qualified' people should be hired. At least half of the white teachers began to cheer loudly at this point in apparent response to the position taken by the white teacher. Another black teacher (or aide) stated that he had witnessed what he considered police brutality against black girls. A white teacher stood up to dispute this, stating that there were no such incidents. Again there was a great response from the white teachers, who cheered the white teacher's position. The only times that there were loud or vehement responses during the meeting came after black tachers offered their suggestions and were contradicted by white teachers. The whole tone of the meeting was whites against blacks."

The outcome of the meeting was a vote, 26-24, to decline the assistance of the mediation board on the basis that its procedures were not sufficiently explicit.[5]

[5] However, on the second day of hearings on plaintiffs' motion, the faculty voted to reverse its position and to cooperate with the CCC mediating board.

During the same period in October, school department headquarters sought to help alleviate the racial tensions which were erupting at South Boston High School. On October 10, the day after organization of the CCC mediating board, the associate superintendent of schools for planning and the member of the department's office of implementation in charge of programmatic concerns designed an instructional support team to help out at the high school. Such teams had met with success at the middle school level. But when the team leader met with the faculty on October 21, assistance from headquarters was rejected on the basis that the proposals were too vague.

It is possible that, if the CCC mediation board of school department support team had been permitted to help, the major disturbance on October 24 might have been avoided. The faculty's rejection of assistance from two quarters during a time of aggravated racial tension in the school, even after widespread violence occurred among students on October 24, raises doubts whether, as presently constituted, the faculty intends to act as a unit to promote implementation of the court's desegregation plan at South Boston High School. The president of the faculty senate testified at the hearing that he had not read the plan and knew of no discussions by the faculty of Racial-Ethnic Parent Councils (RPCs) and their student counterparts (RSCs), whose establishment the court ordered on October 4, 1974. It may be significant that South Boston High had a 100% white student body and a 99% white faculty for many years before the court's order in these proceedings. In all likelihood many members of the present faculty were initially assigned to South Boston High School by virtue of contractual transfer rights that were exercised at a time when the school was all white. Only 7 of the 100 faculty members assigned to the main building at South Boston High School and 5 of the 24 teachers assigned to the

L Street Annex reside in South Boston. The delicate matter of teacher transfers will be considered further by the court during the pendency of the temporary receivership. The defendants school committee and superintendent have been ordered to cooperate. Some voluntary transfers may be made, and some involuntary, in any case without loss of compensation or seniority.

The declining attendance at South Boston High School, the atmosphere at the school and its effect on education, the school's continuing racial identifiability, the persistence of racial hostility and segregation and the reaction of the faculty as a unit, raise at least two questions: have the adverse developments at South Boston High School been inevitable and is the situation hopeless? In the court's opinion, the answer to both questions is "No." The court's plan established agencies for community participation and support whose potential has scarcely been tapped at South Boston High School: multi-ethnic parent and student councils, a community district advisory council and council of principals, a citywide coordinating council and staff, and links with the University of Masachusetts, Gillette Company Safety Razor Division and the Federal Reserve Bank. An educational planning group for South Boston High School comprised of educators from the University of Massachusetts and twelve teachers and administrators from the high school had several meetings during June and July 1975 and in August submitted a formal, 23-page report containing specific recommendations and proposals for South Boston High School in five general areas: orientation, staff morale, curriculum, career education and discipline. Most of its recommendations have not been acted upon by the administration at South Boston High School, e.g., modified clustering of students so that corridor traffic between classes is reduced; tutoring, laboratories and teacher workshops for students with reading and mathe-

matic skills below grade level; and special programs including guidance counseling, psychological services and alternative programs for disruptive students. In August 1975, school department headquarters issued a so-called Green Book: of general guidelines as to the safety and security, recommending that school administrators "make provisions to provide buses one hour after dismissal to allow more participation in activities, and for discipline purposes." The transportation office received requests for late buses for these purposes from other schools, at the high and middle levels, but no request from South Boston High School for late buses except for athletics, which are practically the only form of extracurricular activity. An elaborate reporting system was set up for the reporting of non-violent racial incidents such as racial chants and slurs; but nothing was done about the reports. They were not investigated, assertedly because of a lack of trained investigators. In open court on October 14, the court was told of efforts at South Boston High School to form a "biracial team of retired law enforcement officers who are skilled in carrying out investigations so that they may review the many filed which exist." The reports are still not being investigated, and there is little point to filling one out. There have been no regularly scheduled faculty meetings.

It is not too late for changes at South Boston High School during the current school year. For example, modified clustering of students could be instituted, at least on an experimental basis. Qualified guidance counsellors for both individual and group counseling appear to be needed urgently and they could be put to work at any time. Teaching and course programs can be revised so as to place more students in classes of normal size instead of having handfuls of students in rooms that can comfortably accommodate three or four times as many. Flexible program scheduling might be instituted with the assistance of guid-

ance counselors and data programmers specializing in educational programming, who can be found in the greater Boston area. Extra-curricular activities can be expanded to enhance opportunities for increased understanding between students sharing common interests. An established workable grievance procedure would enable students to report grievances and, if valid, have action taken with respect to them. Changes can be made and announced to students and parents other than in response to crises. Their principal purpose would be to make the school more attractive to students who are enrolled in it but not currently attending.

Up to now there has been an almost total preoccupation at South Boston High School with preventing and controlling outbreaks of violence among students. Little has been done to identify and counteract the causes of students' racial tension and frustration and to insulate the school from the rising winds of racial hostility that swirl around it. Here a sharp distinction must be drawn between racial hostility and non-violent opposition to the court's desegregation plan on the ground that it provides for student assignments to schools beyond walking distance. The latter is the right of every citizen with which the court will never interfere. It is quite different, however, from intimidating black students by unprintable racial slurs and signs and handouts from seeking an education in the only school to which they have been assigned through no fault of their own. Affirmative action and imaginative initiative are required to integrate a school that has always been 100% white. At South Boston High School the preconditions to affirmative action have not yet been established. The main purpose of the temporary receivership on December 9 is to see to it that they are.

The most difficult issue involved in deciding the relief to be ordered on plaintiffs' motion is whether the required

changes can occur under the leadership of its distinguished headmaster of the past decade, Dr. William J. Reid, and his team of loyal administrative assistants. The court has come to the first conclusion that they cannot. We re-emphasize a finding stated orally on December 9: at no time did Dr. Reid intentionally discriminate against any student on account of his race or on any other improper or unworthy basis. The court's decision on this issue rests on findings of fact previously made and on the following five additional findings: (a) In addressing the faculty at the beginning of the school year, Dr. Reid stated in substance that the usual educational concerns would have to be subordinated during the coming school year to problems of discipline and security. (b) During his testimony Dr. Reid was asked about a report that South Boston High School was the only high school in the city whose students did not respond warmly to a stage show featuring a nationally known, racially integrated young peoples' singing and dancing group called "Up With People"; and stated, "The fact that we had assembly at all was a major achievement." (c) When on October 8, 1975 black students complained about what they called the prison environment at the school, his written response on October 14 was, "When the student body demonstrates by its actions that it can and will assume the responsibility for its actions, there will be no need of the 'prison atmosphere.' " (d) At the hearing, previous to the court's visits to the school, Dr. Reid testified, "There is learning and teaching going on in every room. Any person who walks through the building can see that for himself." (e) When asked on cross examination whether, in view of the fact that there were no black players on the football team, he favored black student participation in school sports, he replied in substance, "It's a good idea for all students to engage in sports." During his testimony, which has not yet been transcribed, thus requiring the court to rely on its notes and recollection, Dr. Reid tended

to prescind from the racial dimensions of subjects he was discussing, almost as if reluctant or embarrassed to speak directly about racial hostilities and problems.

A receivership of South Boston High School has been selected as the vehicle for effectuating the required changes and the capable superintendent of the district in which South Boston High School is located, Mr. Joseph McDonough, has been named receiver because these interventions would least interfere with the normal operations of the school. On the basis of the history of these proceedings, the court can expect no assistance from the school committee as presently constituted. Approximately a year ago, a majority of the present committee filed answers to interrogatories of the court in which they stated that they "will take no initiative or affirmative action to advocate or supplement a plan which in conscience and principle" they oppose. They have lived up to their pledge. This attitude has guided their present counsel in which counsel refer to as their "advocacy" approach to these proceedings. For example, at a hearing on either August 12 or 14, 1975, discussion turned to a recent vote of the school committee; the court noted that it did not have a copy of the vote and requested school committee counsel to supply the court with a copy, whereupon counsel asked, "Is that a direct order?"

The principal but by no means only tactic of the school committee in obstructing and avoiding implementation of the desegregation plan and other remedial orders entered in this case has been to do no more than what the court has ordered explicitly. The court is therefore compelled to rely on the good faith and professionalism of various officials and employees of the school system to carry out the spirit as well as the letter of its orders, in this instance the order to improve both desegregation and education at South Boston High School.

(s) W. Arthur Garrity, Jr.
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 75-1482

TALLULAH MORGAN, ET AL.,
PLAINTIFFS, APPELLEES,
v.
JOHN J. KERRIGAN, ET AL.,
DEFENDANTS, APPELLANTS.

MEMORANDUM AND ORDER

Entered: December 19, 1975

Defendant School Committee, joined by the School Administrators' Union, seek a stay of several orders of the district court, issued on December 9, and supplemented by the court's memorandum of December 16. A stay is, of course, only an interim measure, holding matters in status quo until the appeal from the orders is heard by this court and decided finally. On the other hand, it could create for six weeks or more a period of uncertainty, and might divest the district court's orders of much of their force for this school year. Three issues are raised at this juncture.*

The first is whether the district court exceeded its discretion or power in enjoining the present School Committee from making appointments to permanent and temporary positions. The order will expire on January 6, 1976, shortly after the expiration of the term of the present School Committee. In the interim, acting appointments can be

* A fourth issue on appeal stemming from the court's order that the Superintendent of Boston Schools oversee the operations of the new Office of Implementation and the Department of School Security Services without interference by the School Committee, was not, for procedural reasons, advanced as a ground for a stay.

made, as they have in fact recently been made, with the approval of the district court. The court was mindful that it had yet to deal with proposals calculated to assure adequate minority representation in administrative positions. It manifested concern that the outgoing School Committee, which it found had continuously obstructed efforts to devise and implement a plan of desegregation, not be able to fill key positions with personnel who could continue its policy of obstructionism long after the newly constituted School Committee assumes its obligations.

We hold that such a time limited moratorium, to preserve the status quo pending more deliberate decisions in furtherance of the objectives of the court's prior decree, was not an abuse of discretion or an excess arrogation of power. *Cf. Castro* v. *Beecher*, 459 F.2d 725 (1st Cir. 1972). We recognize, as do counsel, that in the light of the imminent termination of the present School Committee, this decision is, and must be, conclusive of this issue. However, given the history of intransigence, the pendency of planning for a more sensitized selection process, and the escape valve provided for the immediate filling of any critical vacancies on an acting basis, we deem the court's order to be well within its discretion.

We next consider the court's order that the headmaster and various key administrative officials, as well as the football coach, be transferred from South Boston High School, as of the end of 1975. The duration of such transfer his been left open and the subjects of transfer are not to suffer loss in either seniority or compensation. While, if the motion for stay is denied, the transfers will have been accomplished before hearing on the merits is had, we do not look upon them as irreversible, particularly in view of the steps we are taking to provide for an expedited appeal. The district court's findings with regard to con-

ditions in the High School, based in part on two personal visits, lead us to doubt, at this juncture, that the court could be said to have abused its discretion in bringing about a change in top leadership. If, however, we were later to adopt a different view, we are unable to see the presence of irreparable harm.

The third issue relates to the court's appointment of the Assistant Superintendent for Community District 6 as temporary receiver of the High School and the "L" Street Annex. Concededly, this order has little direct precedent except for *Turner* v. *Goolsby*, 255 F. Supp. 724 (S.D. Ga. 1965), where a three-judge court ordered a county's school system to be placed in receivership under the state superintendent of schools. But the Supreme Court has recognized, with respect to planning, that "the remedy for [officially sponsored] segregation may be administratively awkward, inconvenient, and even bizarre in some situations . . . ." *Swann* v. *Board of Education*, 402 U.S. 1, 28 (1971). At the present, we do not think it likely that the breadth of equitable powers available to the courts in the planning phase is, as a matter of law, narrowed in the implementation phase.

We are mindful of the School Committee's contention that the district court is here substituting its educational philosophy for that of the elected school committee; but we see little to indicate that this order is based on differences over educational philosophy. Rather, the court's findings, and the figures showing declining attendance, suggest an incipient breakdown in the School's ability to function under Phase 2 and to provide equal educational opportunity to those attending it. While the matter will be explored in depth later, and we do not rule formally, these would be matters within the district court's proper area of concern as affecting the constitutional right of

students to a non-segregated public education. In any event, especially as the Receiver is a responsible official of the Boston School system, we do not see the prospect of any irreparable harm to the School Committee, pending expedited briefing and argument on the merits, that could outweigh the possible harm to students were we to stay the order now and thus bring to a halt the district court's remedial efforts.

The motion for stay is therefore denied and the parties will observe the following schedule for briefing and appel-hearing on the merits of the questions:

Leave is granted the parties to proceed upon the record on appeal as certified by the clerk of the district court without reproduction in appendix form;

The parties are granted leave to file ten (10) copies of their respective briefs;

Briefs for all parties are to be filed on or before 2:00 P.M. on Tuesday, January 6, 1976, with proof of service in hand of one copy upon opposing counsel; and

This cause is assigned for hearing at 9:30 A.M. on Friday, January 9, 1976.

By the Court

Clerk

[cert. c. Clerk, U.S.D.C., Mass.; cc. Mss. Lynch and Mirer and Messrs. Leubsdorf, Coleman, Freemont-Smith, Wise, Hansen, McMahon, Moloney, Pressman, Gleason and Sullivan.]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 72-911-G

TALLULAH MORGAN ET AL.,
PLAINTIFFS,
v.
JOHN J. KERRIGAN ET AL.,
DEFENDANTS.

MODIFICATION OF ORDER CONCERNING SOUTH BOSTON HIGH SCHOOL

December 24, 1975

GARRITY, J. The Court of Appeals having denied a stay of the order concerning South Boston High School entered December 9, 1975, and this court's jurisdiction of the matter having thereby been reinstated, it is ordered that paragaraph (1) on page 2 be modified to read as follows:

(1) The temporary receiver and the defendant superintendent of schools together arrange for the transfer from South Boston High School to other positions in the Boston public school system effective on the first school day in January 1976, without reduction in compensation, benefits or seniority, of the building administrator and coach Arthur Perdigao and, as soon as reasonably possible, of all full-time academic administrators who do not presently instruct classes and who were assigned to South Boston High School as of the beginning of the current school year; and arrange for the appointment, subject to prior court approval, of a new building administrator (or acting building administrator) and such administrative staff as the temporary receiver and new building administrator shall, subject to prior court approval, decide upon, provided that the new administrative staff shall be desegregated; the new building administrator (or acting building administrator) shall assume office on January 2, 1976 and shall participate with the temporary receiver and the superintendent in the selection of new administrative staff, whose various members shall assume office as soon thereafter as reasonably possible.

(s) W. ARTHUR GARRITY, JR.
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 72-911-G

TALLULAH MORGAN ET AL.,
PLAINTIFFS,
v.
JOHN J. KERRIGAN ET AL.,
DEFENDANTS.

FIRST ORDER AS TO FACILITIES AT SOUTH BOSTON HIGH SCHOOL

December 24, 1975

GARRITY, J. The court has received a report from temporary receiver McDonough pursuant to paragraph (2) of the order concerning South Boston High School entered December 9, 1975 directing the temporary receiver to plan for the renovation of the school. Mr. McDonough and the court have had the benefit of preliminary recommendations from Joseph F. Ford of the Office of Implementation. The temporary receiver's report directed the attention of the court to two categories of repairs and equipment needed at South Boston High School: the first consists of items of relatively low cost (totaling an estimated $23,950) which can be accomplished during the current Christmas vacation, and the second, of items of greater cost which could be started immediately but as to which the court finds that

the parties should have notice. Hence this order shall be subdivided. The defendants will be ordered to accomplish the first category of items immediately and without further hearing. The second category will be included in the agenda of the hearing already scheduled for December 31, 1975 at 10:00 A.M. and the court will hear the parties before entering orders.

I

The city defendants, that is, the members of the Boston School Committee and Superintendent and Mayor, their agents, attorney sand employees, are ordered to do the following things as soon as possible and during the current Christmas vacation at South Boston High School. The estimated cost of each item appears in parentheses.

1. Repair or replace water bubblers on each floor ($200);
2. Repair toilet stalls in boys' and girls' lavatories ($1,500);
3. Install glass backboards in girls' basketball court ($2,000);
4. Paint the following seven classrooms: 103, 119, 202, 218, 307, 308 and 311 ($3,500);
5. Install new showers and paint boys' shower room ($5,000);
6. Replace broken and torn window shades in each classroom ($6,750);
7. Purchase ten storage cabinets and ten four-drawer file cabinets ($2,000);
8. Rent one Model 2400 Xerox office copier at a rental of $250 per month;
9. Purchase the following equipment for basketball, gymnastics and wrestling ($3,000);

    10 to 12 new MacGregor X10L basketballs
    Matting or pads for safety (permanent or portable on hooks) sponge rubber with leather or naugahyde covers (install under basket at locker-room end of court)
    1 case of tape (1½" width) for taping ankles
    2 nylon netting ball bags (one for varsity and one for J.V.s)
    2 sets of scrimmage vests—one blue set and one red set (7 to a set)
    ½ dozen "Acme Tornado" plastic whistles and lanyards
    1 side horse (with removable pummells)
    1 set of adjustable parallel bars
    1 set of adjustable uneven parallel bars
    2 twelve inch thick foam pads
    1 set of rings
    1 set of high bars
    2 safety belts
    1 chalk pan
    1 case of chalk
    1 2" 20' x 40' wrestling mat
    10 sets of wrestling headgear

In acquiring this category of equipment it is further ordered that the city defendants not employ the formal bidding procedures prescribed by state and municipal statutes and ordinances but rather informal bidding procedures, whereby the purchasing and renting agents, Chief Structural Engineer Galeota, Physical Education Department Director Moran and Business Manager Burke, shall obtain the best prices available by contacting several suppliers who have previously submitted low or nearly low bids for similar equipment and services in the past. It is further ordered that the city defendants spend for these purposes ESAA funds or other funds allocated to implementing the court's desegregation plan, if possible; but if not possible, that funds for general school purposes be used.

II

The parties are hereby notified that on December 31, 1975 at 10:00 A.M. the court will consider issuing orders to the effect that the work and equipment hereinafter described be commenced or purchased as soon as possible at or for South Boston High School. Where known, an estimate of the cost appears; where not known at present, the information as to cost will be furnished previously to the hearing on December 31.

1. In cafeteria, power scrub floors, install formica tops on tables and paint balance of tables ($15,000);
2. Paint all classrooms other than the seven designated in Part I;
3. Install tile flooring in each classroom ($37,500);
4. Two tables and eight chairs for each of the two teachers' rooms and teachers' aide room;
5. Handball and tennis equipment as follows:
   1 set of goals 8′ x 12′ x 3′
   4 playground balls
   1 set of cone (4 to a set)
   2 sets of 2½ x 60″ x 80″ pads
   12 tennis racquets
   3 doz. tennis balls
   1 set of tennis standards
   1 tennis net
6. At L Street, painting, plastering and replacement of damaged ceiling panels ($10,000).

(s) W. Arthur Garrity, Jr.
United States District Judge

STENOGRAPHIC TRANSCRIPT OF PROCEEDINGS

[1] United States District Court
District of Massachusetts

Civil Action No. 72-911-G

Tallulah Morgan Et Al.,
plaintiffs,
v.
John Kerrigan Et Al.,
defendants.

Before: Hon. W. Arthur Garrity, Jr., *District Judge*

Courtroom No. 4
Federal Building
Boston, Massachusetts
December 31, 1975

Appearances:

Robert Pressman, Esq., for the plaintiffs.
Michael J. Haroz, Esq. and Pamela Taylor, Attorney, for El Comite de Padres.
Philip T. Tierney, Esq., for the defendants Boston School Committee.
Timothy J. W. Wise, Esq., Assistant Attorney General, for the State defendants.
Sandra L. Lynch, Attorney, for the State Board of Education.
Kevin F. Moloney, Esq., Assistant Corporation Counsel, for the Non-School Committee City Defendants.
Charles R. Parrott, Esq., for Superintendent of Schools.

---

[2] PROCEEDINGS

The Clerk: Civil Action No. 72-911-G, Tallulah Morgan et al versus John Kerrigan et al.

The Court: Well, I apologize for being late. I had a brief criminal matter that took longer than I thought.

Now, the first matter on here today is the notice about more repairs down at South Boston High School. Is Mr. Galeota able to be with us today? I know he was going to make an effort.

Mr. Tierney: Pardon me. I spoke to Mr. Galeota and I have him on telephone notice if the Court would like me to give him a call.

The Court: No, I don't need him to be here. I would just prefer that he might be here and it may not be necessary.

Mr. Tierney: Fine.

The Court: Let me ask you, Mr. Tierney, first for what your clients' position is with respect to doing these other things at South Boston High School. They are listed on page 4 of the Court's order of December 24.

Mr. Tierney: Briefly stated, your Honor, my clients would object to the court's ordering us to performing these specific steps.

The Court: Well, please state the reasons.

[3] Mr. Tierney: Fundamentally, your Honor, however educationally sound the Court's orders in this respect might be, it is our position that the Court is without the authority in this area to enter such an order. We have consistently maintained that under our view of the cases the purpose of desegregation is to create a unitary school system, and furthermore the goal in this case is equal educational opportunity. The constitutional mandate, or the Constitution rather, speaks in a quantitative sense, it does not speak in a qualitative sense and we simply feel that desegregation has been brought about in the Boston public

schools and we believe that the Court is without authority to enter this type of an order.

The Court: Okay. Who wishes, if anyone, to be heard on this matter?

Mr. Moloney: I do, your Honor. Two preliminary inquiries. One is as to the first part of the order and there is a reference in the order on a report from the temporary Receiver McDonough. I noticed from an earlier procedure order that a report was called for not later than February 2, I believe. But our office has not, and I assume other parties have not, seen the report upon which apparently the Court's order was based and I wondered if that was a written report and whether or not the parties will be allowed to see what that report has.

[4] The Court: Positively. The parties can see anything and everything. I'm just looking at some filings that were to be filed but I gather they do not pertain to this matter.

Yes, here is the report, and you'll be more than welcome to read it. It isn't that different from what the Court's order was. I have asked Mr. McDonough in the order appointing him to file a report with respect to renovations that would be necessary at South Boston High and here is a copy of his list. It is dated December 23rd and it is subdivided into recommendations for immediate alterations and repairs and equipment purchase recommendations and it enclosed a report to him from Joseph F. Ford of the Office of Implementation, dated December 22, and this was entitled, it's covered by a covering memo from Mr. Ford to Mr. McDonough and then it has Office of Implementation recommendations relative to equipment and alterations at South Boston High School. And this is subdivided into all sorts of subdivisions. So the Court incorporated in the order of December 24th only those that seemed to be the most urgent, and most urgently needed, and disregarded other recommendations completely. By way of illustration,

it was proposed that the blackboards at the school be taken out and that there was proposed for consideration that the blackboards be taken out and replaced with the modern type of blackboard, which I guess is a green board. But when on inquiry I [5] found that the cost of doing it would be in the six figures, in excess of $100,000, I just abandoned it; I figured that was too much money to be spent on a crash program type basis. It's the sort of thing that has to be considered as part of perhaps a permanent plan for renovation, a long-range plan such as filed for the consideration and the comments of the parties early in February.

Mr. Moloney: Your Honor, can you tell us who made the cost estimates, or is that reflected in the plan?

The Court: These cost estimates by Mr. Galeota or someone in Mr. Galeota's office; is that right?

Mr. Flaherty: Yes, your Honor.

The Court: It was Mr. Galeota's office who made these estimates and perhaps Mr. Galeota personally, I'm not sure.

Mr. Maloney: With respect to item 4, painting four classrooms I was informed that it was escalated to $55,000, which would put the cost estimate under some duobt. And the other preliminary question is, has the Court made a finding to support this order?

The Court: Which one?

Mr. Maloney: Part 1 as well as part 2.

The Court: No, part 2 is just a notice of hearing. The basis of the order with respect to part 1, and that's the order that things be done immediately, this is the repairing of the bubblers and the toilets and painting seven [6] classrooms, were very much needed and urgently, and the new showers in the boys' room and the window shades and things of that nature. The basis for that order is that these expenditures in the Court's opinion are absolutely necessary to the achievement of a peaceful desegregation education at South Boston High School. Things need to be done in the Court's opinion to make the plan work at South Boston High School. Some of those things have to do with personnel, and as to that there are other orders entered with which you are familiar, but in addition to changes in personnel the Court has concluded and has stated that there are some changes, in fact some substantial changes in the physical plant which are required there if the plan is to work. So that's the basis of the order and it's the basis of the Court's considering ordering today that other work be done. The Court believes that part of the reason for the lack of successful implementation of the desegregation plan at South Boston High School is that the place is so run down. One of the things that I ordered under part 1 is an office copier. Can you imagine a high school operating without a copying machine? There are copying machines in middle schools in the City, there are copying machines used constantly in other schools, but South Boston High School doesn't have one and that's why it is ordered on an emergency basis. You've got to make the plant down there [7] at least approach the same type of facility as you have in other high schools in the City if desegregation is ever going to work there and that's the basis of the Court's order with respect to the copier and with respect to some of these other items; with respect to all of them. Let me just say, and then I'll stop expanding on the Court's reason, that this is a legitimate question that Mr. Tierney raises. He says that the Court may not properly look to the quality, if I understand his position correctly, of the education and of the facilities. That if you have facilities that are run down and you send an equal or a representative number of white and black and other minority pupils to those facilities, then that's the end of the Court's responsibility and not just the Court's

responsibility but the Court's power. I think the phrase he used was quantitative, not qualitative. The Court simply has a diametrically opposite view. I have said so often that I have never thought it was the Court's obligation to come up with a desegregation plan that was guaranteed to fail. I have always thought it was the Court's obligation to come up with a plan that had a good chance to succeed. And I think that you cannot expect peaceful integration in a school that has been 100 percent white in previous years unless the Court order looks not just to the dumping of appropriate number of black and white pupils in a school and then let them see if [8] they can survive, but rather the Court must under such circumstances look to the programs at the school and the physical condition of the school and indeed the absence of as essential a teaching tool as a copying machine.

So, I have stopped talking on that basis and let me hear what objections you have to superpose. Maybe we shall get Mr. Galeota down here with respect to the reasonableness of these figures.

Mr. Tierney: May I suggest that someone call Mr. Galeota.

The Court: Why not. He's the man who would be able to state why the tile flooring is estimated at $37,000 instead of $3,700. Yes, Mr. Moloney.

Mr. Moloney: I have procedure and substantive objection to both parts of the order, your Honor. Number one, the report of the Receiver was not made available to the parties and the Court apparently acted upon the report without hearing the views of the parties prior to ordering the items listed on page 1 and it would seem to me that the order was made in somewhat of a vacuum. With respect to the finding, I read the Court's finding after the South Boston hearing and there was nothing mentioned in the finding nor was there any evidence introduced that would

show any connection in my view between the testimony and the affidavit and the problem that the Court was dealing [9] with during those hearings and conditions of the building. And I think that the law is other than requiring as a matter of constitutional right that the rental of one model 2400 Xerox office copier must be done. While these may be things that a School Committee or a society may want to do, and as Mr. Tierney said might be nice to do or educationally sound, it seems to me that the Court has gone beyond its proper scope.

The Court: You have, as I said before, that is indeed a proper issue. That's an issue which among several others is pending before the Court of Appeals, as you know. It was argued in September before the Court of Appeals for this circuit.

Mr. Moloney: Now, is your Honor going to wait for Mr. Galeota before getting into part 2?

The Court: Oh, no, talk about it, please, except with respect to the particular estimates.

Mr. Moloney: Well, the objections that I have to part 1 would also apply to part 2.

The Court: Certainly. Well you don't need Mr. Galeota for that.

Mr. Tierney: Is the Court by issuing the part 2 of the order, which the Court has said is a notice for a hearing, in the position of taking the legal position that tile flooring as a matter of law is to be installed in all of [10] the classrooms without a showing or a finding that the present floors are structurally unsound?

The Court: That's what I want to hear you on. This is a notice of a hearing, so that you can say that there is no evidence. You tell me what you think should be done with respect to these matters. If you say abandon them all I'll at least consider your position and point of view.

Mr. Moloney: Well, it's difficult to say anything but

opposition to it, your Honor, because there is nothing in the record, after looking at it, in my view to support the Court's jurisdiction and even if it were supported there is nothing in the record which would show that it would be essential.

The Court: I think you have made that point.

Mr. Tierney: And an objection that I made with point one would also be applicable. And furthermore, given the fact that the School Department is now projected to be $20.5 million in the red by the end of the fiscal year, which is approximately $20.5 mililon on top of the budget of somewhere around $148, $149 million, to order $38,000 worth of tile flooring and the painting of all classrooms, installing formica tops on tables in the cafeteria, and the other items here, I just think is unreasonable and inequitable under the circumstances. There hasn't been a showing that the absence of formica tops or the painting in [11] the classrooms or the absence of tile flooring has had any contribution to the conditions that the Court found to exist at South Boston High School nor any connection with the orders that the Court made with putting the school into receivership or making changes in administrative personnel.

The Court: Well, that's well stated. Who else wishes to be heard, if anyone?

Mr. Pressman: In our view these orders of the Court are firmly rooted in the findings that the Court made on our motion concerning South Boston High School. The Court found that there was a more than, for the full period of desegregation, a pattern of private interference with the rights of black students, nonenforcement of specific Court orders, that black students were physically and verbally mistreated within the school and there was a general failure by the School Committee to address the problem. The only way to look at the problem is that the

School Committee has been, to have an example of something not working than trying to deal with the problem.

The Court: Someone coughed and I didn't hear.

Mr. Pressman: What I say is that the fair way to look at it is that the School Committee has been able to point to something not working than trying to make it work, and all this has a predictable effect that is set forth in the supplementary findings of the Court on December 16, 1975. [12] Of the small number of students who have enrolled at South Boston High School compared to other schools, a smaller number are attending. On three days the Court set out at pages 7 and 8 the percentages of black students who attended: 44 percent one day, 34 percent, 37 percent a third day, and that's just of the students who enrolled. And it's obvious why the students aren't going, because it's been a very bad place to be because of public and private and unlawful conduct, and it's obvious that if the plan is to work things need to be done so that the school is more attractive and people are willing to go. And no one thing is going to be alone the thing to turn the situation around, if it can be turned around, but these are a proper effort to start to turn the situation around. Mr. McDonough is an experienced educator, experienced in that district; he made these recommendations. There's some indication that Mr. Galeota was consulted as to the costs. And we think that is a proper effort, given the specific findings of interference and harassment made here to try to make this a school where students will be willing to go.

The arguments are made as if, by the School Committee especially, the Court can never get involved in dealing with changes in facilities and that's not the case, under the case law. There are many cases, including Plaquemiens Parish School Board versus United States, 415 F 2d at 841 where Courts [13] have ordered that things be done

with respect to facilities. Now, generally that has been where facilities are unequal. But in our view that's not the only situation where the Court can deal with facilities and we think that this situation where there's been so much conduct to make the school unattractive to black students, that the Court can also direct things that will be one step in trying to right the situation. We do think it would be helpful in the future if reports of the Receiver are filed with the parties as well as with the Court.

The Court: Miss Lynch.

Ms. Lynch: Simply, your Honor, that the State Board of Education feels that the Court does have the authority to enter an order of this sort and that that is entirely proper for the Court and the parties to be concerned about the physical conditions, which in many instances are appalling at that high school. What we find somewhat peculiar is an assumption by certain parties that the Court and the other parties may not rely on the administrative expertise of certain personnel in the Boston School Department: In this case Receiver McDonough who has been given a specific task to perform. Throughout this case we have gotten reports from personnel of the Boston School Department about conditions and about things that require changing in the school system and based on those reports this Court has entered [14] orders. If parties wish to object to this method of proceeding then the burden is on them to come in and say that indeed the tile flooring on the classrooms is adequate. We have seen no showing of that. There was adequate notice of the issues. However, we do feel, as has been stated by Mr. Pressman, that it would be helpful were we to be given copies of the Receiver's reports. I might suggest that since it is Mr. Moloney whose objection is based on not having seen the Receiver's report, that perhaps he be given until the end of today or

until Friday to view the report and file written objections with the Court based on that.

The Court: Anyone else?

Well, all right, if you want to say something.

Mr. Moloney: Well, I think that report ought to be given, your Honor, and I object strenuously to the Court issuing orders based on a private communication with an employee of the School Department.

The Court: It's not just a private communication; it's a report from a Court Appointed Receiver. The Courts constantly and routinely receive ex parte reports from agents appointed by the Court. I have been in constant communication with Mr. McDonough on aspects of the South Boston High School situation. There hasn't been a day gone by when we haven't been on the telephone to each other and we have met on several occasions. Do you think I'm going to turn it [15] into a meeting with a dozen different lawyers?—positively not. The Court here has, as previously stated, taken over a specifically limited responsibility with respect to that particular school and I'm not going to notify counsel every time I have a telephone call with the Court's temporary Receiver. So you have a point that I think is well made and I certainly will have you receive a copy of this report. It simply lists the things that should be done immediately and those that should be started immediately.

Anyone else? Mr. Tierney.

Mr. Tierney: Your Honor, while waiting for Mr. Galeota—

The Court: I'll suspend this until after he arrives but only after you have made such statement as you wish.

Mr. Tierney: Simply for the benefit of the parties, I did have two more figures on the cost of the other work but perhaps we should—

The Court: Well, just give them to me and I'll make

a note here and I may find it helpful myself. What do you have?

Mr. Tierney: With respect to number two, in the second part of the Court's order, paint all classrooms other than the seven designated in part 1. Mr. Galeota gave me a rough estimate yesterday of $55,000.

The Court: Okay.

Mr. Tierney: And number four, your Honor, the tables

• • •

[38] The Court: Do you have a copy of the communication to City Hall with respect to the bond issue request?

Mr. Galeota: No, I didn't take it with me.

The Court: Could you forward it to the Clerk or put a copy in the mail?

Mr. Galeota: Yes.

The Court: And I assume that you have a copier at your office. Would you send ten copies down and the Clerk would get them out to the counsel, whose names and addresses we know.

Mr. Galeota: Yes, I have.

The Court: Now, in the order entered the day before Christmas it provided that the City defendants spend for these purposes, this is the Christmas vacation period, ESAA funds or other funds allocated to implementing the Court's desegregation plan if possible but if not possible that funds for general school purposes be used. The school funding is a very occult specialty and science and art. Where money comes from for school purposes is a career in itself, and I don't know all of the answers by a long point, but I knew more about it when you were here once before; where is it that your money comes from? Is it in the School Committee budget approved by the Mayor's office; is that how it's figured?

Mr. Galeota: It's by statute: it's $3 per $1,000 of [39] valuation and this is by statute. And this is voted

on by the School Committee and I believe it takes a four-fifth's vote and that's the most money that could be appropriated for this purpose. This is set aside and is a separate item than the general school purposes budget.

The Court: And do you have at the tip of your tongue that statute that so provides?

Mr. Galeota: I wish I did, but I don't.

The Court: Okay.

Mr. Galeota: But that nets about $4.9 million under the assessment of 1974.

The Court: Now we are talking about the real property assessment in the City of Boston?

Mr. Galeota: Yes, of actual property valuation.

The Court: So if there is 100 percent valuation would you get double the money to spend?

Mr. Galeota: That would be great. I imagine there would have to be an adjustment there.

The Court: And that $4.9 million is for the school year '75 - '76?

Mr. Galeota: Yes.

The Court: And it's that money that you have now virtually run out of?

Mr. Galeota: We are down to very, very low, because that takes care of salaries, veterans' retirement, office [40] supplies and the balance is that. So I'm down very low, as I said previously—

The Court: Well, did you have enough money to pay for the basketballs? That's not your department. I should have said did you have enough money to pay for the cabinets that were estimated to be $2,000?

Mr. Galeota: I spoke with Mr. Burt yesterday afternoon, your Honor, and he said that as a result of your order that I should charge it to his budget. So I think I can handle that.

The Court: What about the painting in the boys' shower room? Mr. Burt is not going to pick that up?

Mr. Galeota: I'm going to charge that to Mr. Burt's budget. This is an unusual procedure. We have never criss-crossed these budgets before; we were told it's not proper to do it.

The Court: What kind of a budget does Mr. Burt have; is that on the 00192 budget?

Mr. Galeota: I think it is.

The Court: I included that in an order some days ago. It's some sort of an account.

Mr. Galeota: Yes, it's separate from my account.

The Court: By statute, do you know?

Mr. Galeota: Yes.

The Court: Is it linked to the valuation of the [41] property in the City?

Mr. Galeota: I'm only giving you this as informational basis. Mr. Burt, the budget of the School Department for the general school purposes is based on the amount of money spent the previous year.

The Court: And that's Mr. Burt's?

Mr. Galeota: Yes, for general school purposes.

The Court: Yes.

Mr. Moloney: It is an occult science as the Court said. But over a year ago there were briefs filed laying out the statutory procedure, and Mr. Galeota's budget is a separate budget. The rest of the school budget, as a rule of thumb, and there are places for variation, caused it to be raised by taxation in basically the amount that they had last year. If they want to have additional funds the Mayor has to make up his mind and makes a recommendation to the City Council and if the Mayor recommends and the Council votes then the City, the School Committee has the additional funding. But what has been, is that the school budget was $148 million which was probably in excess of

$20 million over the last year, and the current state of affairs of the School Department it is approximately $20.5 million in the red in addition to that. So it can likely be concluded that there aren't funds for school purposes that can be used for this.

The Court: I said it this year in the fall, you know, [42] conceivably, although certainly not expected, the City of Boston may run out of funds with which to keep the schools open beyond some date in the spring, sooner than the end of the school year. That's happened in other cities. We certainly don't expect or think that or expect that will happen or that it will be other than an absolute tragedy to be avoided. On the other hand, it has happened elsewhere, we all know that. Ohio is the state that leads the nation in early school closing. Out there they run out of money in mid-April or mid-May and the people have refused to vote on issues that would keep the schools open until the end of the school year. So it's in that area that you are now talking about?

Mr. Moloney: It is a very serious issue. Mr. Galeota is right when he talks about the bond market, the interest rates are unbelievable, and the financial plight in the City is extraordinary.

The Court: That is very important and as a matter of fact I received this morning before coming to Court a very comprehensive analysis of the problem to which you refer.

Well, let me then ask one other question on a different topic because you did draw the distinction with Mr. Moran's budget and your own that would have to do with this athletic equipment. Whose jurisdiction is it when it comes to dressing rooms and locker rooms and that sort of thing? Is [43] that yours or his?

Mr. Galeota: To do what with the locker rooms, sir?—the putting in of lockers?

The Court: Correct.

Mr. Galeota: That's my department.

The Court: Is there anything in the locker room that's his except the equipment?

Mr. Galeota: Just the equipment. We take care of the showers, the lockers, the benches to sit down on, the painting, the tiling; this is under my jurisdiction, your Honor.

The Court: Over at Roslindale High the football players and baseball players, they have to dress out-of-doors, there is no place for them to change their clothes indoors. Is that something that has come to your attention?

Mr. Galeota: I'm well aware of that.

The Court: How can it be that the athletic teams can't put on their clothes inside. I can't understand it.

Mr. Galeota: Well, I think that that situation, I might say was partially resolved because I was out on it a few years ago.

The Court: I know there's no money but don't you think there would be money for this sort of thing?

Mr. Galeota: The truth of the matter is that Roslindale practiced their baseball and football at Healey [44] Field right down the street from there and it was felt there was no need of showers or anything at the school.

The Court: I didn't say showers.

Mr. Galeota: But the showers were in one of the reports that I read. Now that's where they went for years to practice their baseball and football and they took their showers and dressed there and did everything that they wanted there and they went from there home. Now a few years ago vandals got in and burnt down the field house at Healey Field and there was no place for them to go. The complaint, was to Helen Moran as the Headmaster of Roslindale High, and it was brought to my attention also. It is true that the shower room is small, not adequate,

and we put new shower heads on there and provided a dressing room. It's true that they have to dress upstairs and go down to the shower room or vice versa. There was also at that time, your Honor, a girls' shower room that had been there since the building was built and they had never used it. Whether or not it is used today I don't know. The space is available, it's up to somebody in the administration to say here it is, use it. We will do all in our power to use it.

The Court: That is very helpful. I was unaware of the Healey Field base, and I can see it was a special situation.

Mr. Galeota: It's not the best situation in the world [45] I must admit but I'll do all I can to help it out.

The Court: In other matters you always seem to have these problems at your finger tips; you really do. I have no further questions and I thank you for coming down. If you have something else—

Mr. Galeota: There is one thing that is not on the report because the report was made out prior to my receiving or reading in the report that I was going to get re South Boston. That was the glass backboards. For your information, I did make some calls out west to a couple of companies because they are not stock items.

The Court: There are glass backboards in the boys' gym.

Mr. Galeota: In the boys' gym there are two glass backboards on the main court and on the side courts there are four backstops which are wood. In the girls', which is a smaller gym, there is two wooden backboards which are in excellent condition but the Court said they wanted glass. So I said, all right, I'll go ahead with it. So I made a call out west and I placed an order to ship them. It will take about two weeks before it gets here, however. So if you do get a complaint and it's delayed a week or two

you must understand that the present backboards stick out of the wall, these glass backboards weigh two hundred and fifty pounds apiece and if you put them up there it will tend to [46] pull the units off the wall, and I have to put hangers from the ceiling, hence it will take two or three weeks to do that. But I wanted to do it and I do expect prices on my desk for the installation of same.

The Court: Thank you. Just one other question. What about the statutory bidding procedures? Can they be followed with respect to the items that you were first discussing, those six items or five items on the last page? I'm talking about the cafeteria formica tops and the painting and the tile flooring and so forth. What is the procedure that the law requires to be followed with respect to these items? Can it be done in these instances in your opinion or should it be done in these instances in your opinion?

Mr. Galeota: It's my considered judgment, your Honor, that anything of a sizeable amount, I don't honestly believe that there is any dire emergency here as there was at the Boston Trade School, and where the amounts run for $37,500 for the tile floor or $15,000 for the formica, and the painting some fifty odd thousand dollars, I would highly recommend, your Honor, that we go through standard bidding procedures because of the fact that if we were to do the formica top tables I could get the bids out if the Court so orders and if I get the money, we could advertise it and this work could be done during the February vacation without disturbing the school. Insofar as the tile floors are [47] concerned and the painting, it depends upon the attitude of the Court. If they want it done right away I could still have the specifications written. As a matter of fact I can tell you right now they are being typed up already as far as the tile floors are concerned, so I'll have them in readiness. But I think work of this nature—tile

floors and painting, should be done during the summer months when nobody is at the school.

The Court: It could however be done in part during the February vacation, could it not?

Mr. Galeota: Yes, it could, part of it then and part during the vacation, we could work with the Administrator of the building and do it during the vacation period.

The Court: What about the panels poked out; the $1,900 item?

Mr. Galeota: I hope that will be done by next week, your Honor. I have the bids coming in on Monday on that.
The Court: Does that mean that you will be able to follow the standard bidding procedure?

Mr. Galeota: I don't need it. It is under $2,000 and under the law I have to seek bids from three contractors, which I have done. And for your information, the other items that ran over the $2,000 I did use the special bidding procedure and did receive three bids on the item.

The Court: Thank you again. You are free to leave now. [48] Maybe you should wait for me to state what the Court's order is and then leave.

Mr. Galeota: All right. Thank you, your Honor.

The Court: Well, here is the Court's order then with respect to that. The Court repeats its finding to the effect that improvement of the facilities at South Boston High School is prerequisite to successful implementation of the plan at that school. We are not dealing in this instance with a school in which desegregation is working. The amount of money here involved is far less than the amount that the Court hopes will be saved when the school gets on the track and most if not all of the ninety-eight state police are out of there and some of the forty-five transitional aides and others. There is an enormous amount of money being spent on policing the school and in my judgment, at least the amount involved in the five or six items

listed on page 5 of the Court's order issued on December 24th, can be saved if the school is renovated to the limited extent here indicated. Parenthetically there will be proposals for much, much more fundamental and much, much more extensive renovation received from the temporary receiver, Mr. McDonough, in February. This is just the beginning. The alternatives that confronted the Court on the basis of the plaintiff's motion were in my view to close the school or make it a school to attract students to it. And this is [49] part of the effort, and there are many more aspects of the effort which will be subject to future Court orders, to get the students who have enrolled in South Boston High School to go to school and not be hanging around street corners wasting their lives away. So the Court feels quite differently from the plausible points mentioned by both Mr. Tierney and Mr. Moloney. Simply because I disagree with them doesn't mean that I recognize that the points that they make, the points that they interpose, that they are substantial, but in my view they are not here controlling and it is my judgment that this type of order is within the Court's jurisdiction. Therefore, the Court orders that these six items of improvements set forth on page 4 of the notice dated December 24 be undertaken and that these expenses for the improvements there stated be made. I'll go over them because the amounts should be stated.

Number 1: For the formica tops on the balance of the tables, I have $12,000. Now the notice said fifteen. Am I correct, Mr. Galeota, in understanding that the scrubbing of the floors is appropriate to reduce it from fifteen to twelve?

Mr. Galeota: I would like to leave it at fifteen thousand. If we save it, we save it.

The Court: And the amount will be $15,000. Painting the classrooms other than the eight classrooms now being

[50] painted during the Christmas recess, $57,000. These are estimates, mind you. Next is the flooring in the classrooms, $37,500. Tables and chairs in the teachers' rooms and teacher aide rooms, $500. Next is the handball and tennis equipment which is beyond Mr. Galeota's area of responsibility, it's Mr. Moran who is the Director of the Department of Athletics, but these items are in the Court's view, this is things like tennis balls and handball equipment, these are essential to there being a decent athletic program at any high school and especially in this instance South Boston High School. The amount is not specified. The Court simply orders as low an expenditure that can be reasonably incurred for the acquisition of these items which are not at South Boston High.

Finally, with respect to L Street, the only work authorized at this time is the repair and the replacement of these damaged ceiling tiles for the $1,900. With respect to these items the Court adopts Mr. Galeota's suggestion that there be no departure from the standard bidding procedure; that is with regard to all items listed whose estimated cost is in excess of $2,000 formal bidding procedures be pursued.

Finally, the Court incorporates the provisions in the December 24th order regarding the first category of repairs; that it is further ordered that the City defendant spend for [51] these ESAA funds, or other funds allocated to furthering the implementation, if possible; but if not possible that funds for general school purposes be used. The matter of painting and plastering at L Street has not been covered because the Court will reserve judgment on that aspect of the notice until Mr. Galeota or some one of his assistants has had a chance to visit L Street and to form an opinion as to whether this painting and plastering work is needed there at this time.

Now, that concludes the Court's order, unless you have some question. Do you have any question, Mr. Galeota?

Mr. Galeota: Well, the only one question I have, your Honor, and I realize that that's taken from the December 24th, was that the money for this be spent out of general school purposes.

The Court: Only if need be.

Mr. Galeota: Well then, where do I get the money to do it? I think that somebody should be—I have some money but it's going to further deplete the empty barrel and I think I would like to see this money replenished.

The Court: Just a minute. By general purposes I'm talking about a portion of the forty-eight million, whether it's included in your budget or not. The language was that the City defendants, that means the Mayor, the Mayor is the principal City defendant, and the School [52] Committee and Superintendent are the other City defendants—

Mr. Galeota: Oh, all right.

The Court: The term City defendants means seven people—five, one and one—they are ordered, and I'll repeat, that the City defendants spend for these purposes—

Mr. Galeota: Oh, fine.

The Court:—these funds, desegregation funds if they are available and if they can be, but if they cannot be or if not possible, quoting again the terms, the funds for general school purposes be used.

Mr. Galeota: I understand now, your Honor.

The Court: And that's the end of that particular subject matter which has taken three times as long as I thought it would.

Yes, Mr. Tierney.

Mr. Tierney: Your Honor, I would like to note my objection for the reasons previously stated. Would it be possible to have this order reduced to writing? Administratively it is—

The Court: Do you have a daily copy?

Mr. Tierney: We have an order for daily copy. I gather that Mrs. Fitzhugh is not able to keep up with it.

The Court: Daily copy means that Mrs. Fitzhugh gets one or two assistants to produce a transcript for 10:00 o'clock the next morning. We haven't had daily copy on [53] this hearing. Believe me, the Court would be delighted if counsel would order daily copy here.

Mr. Tierney: That was not a decision made by any of the parties, your Honor, to terminate daily copy.

The Court: In other words, you are authorized to order daily copy, are you, in which case I'll be the happiest person in the courtroom because I can use daily copy as well, which I can't get unless the parties order it.

Mr. Tierney: If I may be heard for a moment to clarify that, your Honor.

The Court: Positively.

Mr. Tierney: As beneficial as daily copy would be my request would be that the Court issue a written order.

The Court: You've got to pay for it. Daily copy costs twice a much as ordinary copy, maybe three times, I'm not sure of the rates.

The Court: And we would all benefit from it.

Mr. Tierney: I understand that your Honor, but what I explained to the Court is simply that daily copy was not terminated at the request of my office.

The Court: It was terminated long before your office ever came into it. It was terminated back in the liability hearing, back in the spring of whatever—1973.

[54] Mr. Tierney: The request I'm making and I make it respectfully is that the Court issue an order in the form that the other forms be issued because in this fashion I have something to distribute to the personnel in the office and say Mr. Burt, this is what the Court says with respect to funding. When I have to write a letter containing the

Court's comments it makes for the possibility of confusion or misinterpretation.

The Court: There should be daily copy but the parties have to order it. But talk maybe amongst yourselves and see what can be done. I'll consider what you say though. I'll consider the request that the Court enter some sort of order but I will have to check to see if I can do that. I'm not sure about that. Mr. Moloney.

Mr. Moloney: I would like to object for the reasons previously stated and as well to the Court's statement, funds on the ESAA money, that the money doesn't apply if it's ordered by the Court.

The Court: What is that?

Mr. Moloney: Something ordered by the Court is not to be reimbursed by ESAA funds.

The Court: So, isn't there a good reason for the Court not making the request of Mr. Tierney? There is a half million dollars around of ESAA money.

Mr. Moloney: Well, it's not particularly helpful in [55] carrying on some of these expenditures of my clients and has not suggested, has not indicated an understanding of and cooperation of and forthright carrying out of the Court's plan. On the other hand the cost implications and basic reality of what's happening here are just putting the City in an extraordinarily difficult position where it is coming close to the position where there are no funds—

The Court: You said it all before. I already considered it and I said I have a far more comprehensive analysis on my desk that I got this morning. So your point is made, your objection is noted and it's overruled and the Court's order is as stated. Now, let's move on. Yes, Miss Lynch.

Ms. Lynch: As I understand we have about fifteen or twenty persons on the matter of the Occupational Resource Center who have been waiting and would like to get back to their office. Could we rearrange a general day—

The Court: We'll take it up next. Let me tell you what I think this situation to be. That in late September or early October the Court received all sorts of assurances from people in positions of responsibility that work would go forward with the planning of the Occupational Resource Center and the vocational and educational plan. I see here notes of the testimony on the witness stand, for example, of Commissioner Regraff, Dr. Randy I think testified, and everyone was going to go—Mr. Vey testified—everything

• • •

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 72-911-G

TALLULAH MORGAN ET AL.,
PLAINTIFFS,
v.
JOHN J. KERRIGAN ET AL.,
DEFENDANTS.

CORRECTIONS IN SUPPLEMENTARY FINDINGS FILED DECEMBER 16, 1975

January 5, 1976

GARRITY, J. The following two corrections should be made in the court's supplementary findings and conclusions filed December 16, 1975:

(a) After the word "students" in the 5th line from the bottom of page 8, insert the words "during the two months of September and October, 1975."

(b) Strike the sentence beginning at the foot of page 23 and continuing at the top of page 24 and substitute the following, "For example, at a hearing on July 31, 1975, discussion turned to a recent vote

of the school committee; the court noted that it did not have a copy of the vote and requested school committee counsel to supply the court with a copy, whereupon counsel asked, 'May I have that in a specific order, your Honor?' (pp. 11-23; see also pp. 104 ff.)"

(s) W. Arthur Garrity, Jr.
United States District Judge

United States District Court
District of Massachusetts

Civil Action No. 72-911-G

Tallulah Morgan Et Al.,
plaintiffs,
v.
John J. Kerrigan Et Al.,
defendants.

SUBSTITUTION OF TEMPORARY RECEIVER

January 6, 1976

Garrity, J. Whereas (a) district superintendent Joseph M. McDonough has complied with all provisions of the court's order concerning South Boston High School dated December 9, 1975 as modified December 24, 1975 which could reasonably be accomplished to date, including the partial renovation of the physical facilities there, (b) James B. Corscadden has been appointed, with prior court approval, as interim building administrator of South Boston High School, (c) Mr. McDonough requested that, upon Mr. Corscadden's appointment, he be relieved of further duties as temporary receiver, and (d) some of the duties of the temporary receiver, e.g., the transfer of teachers, can be performed most effectively by the superintendent of schools, it is ORDERED that defendant Superintendent of Schools Marion J. Fahey be substituted for Joseph M.

McDonough as temporary receiver and perform the duties of temporary receiver prescribed in the court's order entered December 9, 1975, as modified December 24, 1975, provided that Superintendent Fahey may delegate the preparation of plans and reports called for in those orders.

It is FURTHER ORDERED that all parties and intervenors in these proceedings, their agents, attorneys and employees, cooperate with the temporary receiver in the performance of her duties; and that the defendant Boston School Committee reimburse Superintendent Fahey for all reasonable expenses incurred by her in the performance of her duties as temporary receiver whether or not she would be entitled to reimbursement in her capacity as superintendent of schools.

(s) W. Arthur Garrity, Jr.
United States District Judge

United States District Court
District of Massachusetts

Civil Action No. 72-911-G

Tallulah Morgan Et Al.,
plaintiffs,
v.
John J. Kerrigan Et Al.,
defendants.

MEMORANDUM AND THIRD ORDER AS TO FACILITIES AT SOUTH BOSTON HIGH SCHOOL

February 11, 1976

Garrity, J. In the court's order concerning South Boston High School dated December 9, 1975 in which the school was placed in temporary receivership, it was provided that the temporary receiver file with the court on or

before February 2, 1976 a plan and chronology for the substantial renovation of South Boston High School, including the cafeteria and kitchen, gymnasia and equipment, music and art departments, and facilities for business office education, automotive mechanics and sheet metal shops. Based upon reports received in December from Temporary Receiver McDonough, the court entered two orders for partial renovation of South Boston High School. The first was entered on December 24, 1975. The second was an oral order entered December 31, 1975 based upon notice given in Part II of the previous order of December 24.

Pursuant to the court's order dated December 9, 1975 Temporary Receiver Fahey filed on February 2, 1976 the plan and chronology called for. It is a comprehensive plan, 28 pages in length, not counting 6 pages of lists of alterations and repairs and their approximate costs which follow page 6 in the temporary receiver's plan, of which copies are appended as Lists A and B to the order contained herein and incorporated herein by reference. On February 6 the temporary receiver filed a three-page supplement pertaining to the L Street Annex, with instructions that it be inserted after page 26 of the plan. Four appendices are annexed to the temporary receiver's plan, as follows:

APPENDIX A

1. Copies of letters from Mr. Joseph McDonough to various department heads requesting certain information (December 31, 1975)
2. Copy of Memorandum from Miss Marion J. Fahey, Superintendent, to various department heads issuing directions regarding the Court Order of December 9, 1975 (January 9, 1976)

APPENDIX B

Original Requests for Alterations, Repairs and Equipment Purchases

APPENDIX C

Work Completed or Begun at South Boston High School Since December 26, 1975

APPENDIX D

Planning and Engineering Report Concerning South Boston High School

Generally speaking, the temporary receiver's plan is comprehensive and conservative. As shown in its introductory pages and in the table of estimated expenditures at page 7, it is based upon consultation with all concerned department administrators and others and proposes in several instances expenditures less than their recommendations.[1]

I

The court will follow the same procedure followed in its first order entered December 24, 1975, namely, order without notice and hearing certain relatively minor repairs which are needed immediately and are listed under the heading "Immediately" in the list following page 6 of the temporary receiver's plan; and also the relatively minor repairs listed under the heading "February Vacation" on the pages which follow. "Relatively minor" in this context means alterations and repairs whose approximate cost is less than $1,000. The total approximate cost of these items is $6,873.10. They appear on the four pages hereto attached as List A. With respect to those alterations and repairs, the city defendants, that is, the members of the Boston School Committee and Superintendent and Mayor, their agents, attorneys and employees are ordered to perform them as soon as possible and during the February

[1] Parenthetically, the temporary receiver is directed to send photocopies of the plan and chronology and the appendices thereto attached to the Racial Ethnic Parents' Council at South Boston High School, the Community District Advisory Council for Community District VI, the Citywide Parents' Advisory Council and the Chairman of the Citywide Coordinating Council.

vacation which occurs next week. The appropriate purchasing agents shall obtain the best prices available and shall not exceed the approximate costs listed except with the approval of the temporary receiver.

Regarding relatively major alterations and repairs appearing on List A, the court reserves judgment until after hearing.

II

The parties are hereby notified that on March 2, 1976 at 10:00 a.m. the court will consider issuing orders to the effect that the relatively major alterations and repairs included in List A hereto attached, i.e., whose approximate cost is $1,000. or more, be performed as soon as feasible at South Boston High School. At the same hearing the court will consider issuing orders to the effect that the alterations and repairs listed under the headings "April Vacation" and "June" be performed during the periods indicated. These items appear on two pages hereto attached and marked List B.

At the same hearing the court will hear the parties on all aspects of the plan and chronology filed on February 2, 1976 by the temporary receiver, including both renovations recommended by the receiver and proposals which have been rejected. The entire plan and chronology is delivered to the Clerk contemporaneously with this order and may be examined and copied by any interested person.

(s) W. Arthur Garrity, Jr.
United States District Judge

LIST A-1

Alterations & Repairs	Approximate Cost
IMMEDIATELY	
Large Gym. Boys	
Install mesh grilles on windows (one under balcony—the other at opposite end of same wall)	300.00
Gymnasium (Girls')	
Repair grilles on windows where needed (near Instructors' Office)	300.00
Install Grilles on Instructors' Doors and Windows) (Security)	100.00
Furnish two (2) new desks in Instructors' Office (Small gym)	400.00
Install Bulletin Board 4'x6'	120.00
Repair Intercom System from Headmaster's Office to Office & Gym of Girls' Instructor	500.00
Instructors' Office — L Street	
Install Metal Grille on door.	50.00
Provides storage lockers for athletic material and personal belongings. (coat lockers)	450.00
Gymnasium L Street	
Pad walls under each basket	750.00
Storage Room Off Gym — L Street	
Install metal grille on door, replace locks, provide lockers (4) for storage plus 1 coat locker for Instructor	475.00
Music Department	
New doors for both front and rear of classroom (Room 121) with windows	400.00
Windows in Office (anteroom) replaced and repaired	100.00
Auditorium	
Provide heat for rooms in Auditorium	3600.00
Girls' Gymnasium	
Repair lock on Girl's gym office door	25.00
Secure and repair door in supply room in Girl's Gym	25.00
P.A. System in Gym and locker room	1000.00
Clock	20.00
Room 119	
New Door	150.00
New Teacher's Desk and Chair	250.00

LIST A–2

Alterations & Repairs	Approximate Cost
IMMEDIATELY	
Room 228	
Repair door between 208 and 228 and repair frame	150.00
Repair clock	20.00
Repair to Headmaster's Office	
Windows in office will not open	30.00
Room 311	
Install a cork bulletin board	100.00

LIST A–3

Alterations & Repairs	Approximate Cost
FEBRUARY VACATION (2/16 – 2/20/76)	
Improve heating in Auto Body Shop to prevent water pipes from freezing	2000.00
Repair wall storage cabinets in Room 112	200.00
Replace weld test stand in Welding Shop	500.00
Large Gymnasium (Boys)	
Install Bulletin Board 4'x6'	120.00
Gymnasium (Girls)	
Replace floor molding	500.00
Room 121 (Dance Studio Boys & Girls)	
Install six (6) training bars on long wall @ $1.35	8.10
Install long mirrors on two walls	200.00
Secure door with grille	50.00
Furnish 2 drums for dance (Rhythm Drums) Studio #19 14" round, 2' long	60.00
Gymnasium "L" Street	
Replace B.B. Backboards and Rims	3000.00
Other	
Repair/remove broken wooden glass bookcases throughout building.	1500.00
Rooms 117 & 118	
Electrical—1 220 volt line for stove, 1 24 hour 110 volt line for refrigerator and freezer outlets	3000.00

Plumbing	
1 Install utility sink with double drain board hot and cold water supply & drain—Room 117	
1 Hot and cold water mixing valve with shut off for portable dishwasher - hookup—Room 117	
Room 311	
Second window sill from front of room needs to be nailed down	50.00
Electric socket in back of room does not work	60.00
One of the electric light panels by window needs to be replaced	60.00
Room 101	
Repair stainless steel work table	50.00

LIST A–4

Alterations & Repairs	Approximate Cost
FEBRUARY VACATION (2/16 – 2/20/76)	
Room 102	
Install Clothes Dryer Essential (Not included in Remodeling Plans)	300.00

LIST B–1

Alterations & Repairs	Approximate Cost
APRIL VACATION (4/19 – 4/23/76)	
Install effective security system in Auto Body Shop	2000.00
Install five duplex wall receptacles in Shop #IV	1000.00
Install airline in Shop #III	1500.00
Large Gymnasium (Boys)	
Install Maroon Matting at either end of gym @ 700.00 per	1400.00
Install six (6) Individual Chinning Bars on Office Side of Gym. Approximately 36" wide @ $102 per	512.00
Storage Areas (Large Boys' Gym)	
Install fan to work off light switch.	
Construct *bins* on long wall.	
Install Helmet Racks.	
Install metal grilles on storage room door.	1200.00

Storage Room Opposite Instructors' Office
Install fan to work off light switch
Install Metal Grille on door for security. 200.00
Gymnasium (Girls)
Install Maroon Matting at either end of gym
@ $375 per (16'x6') 750.00

Storage Rooms Attached to Small Gym (Girls)
Storage Room on Office Walls
Install fan to work off electric switch
Install shelves (as many as possible)
Secure door with metal grilles 600.00

Storage Room Leading to Girls' Dressing Room
Improve drainage system on Shower Room floor.
Replace broken glass blocks in ceiling. 4000.00

Girls' Shower Room
Improve drainage system on Shower Room floor.
Replace broken glass blocks in ceiling. 4000.00

Air Condition Headmaster's Office & Secretary's Office 6000.00
(Necessary for Summer work)

LIST B–2

ALTERATIONS & REPAIRS — Approximate Cost

JUNE

Construct safer storage facility for acetylene, argon and oxygen gas tanks 15,000.00
Install ventilating system in two shops 6,000.00
Construct Storage Room with shelves and lights directly under overhang of balcony; this would supply storage for new court-ordered equipment. 2,500.00

Gymnasium (L Street)
Clean, repair, reline floor surface 2,000.00

Science Department
Renovate present two Biology Rooms (308 & 310) @ $20,000 each, including:
Biology Demonstration Table,
Student Biology Tables,
Case cabinet work,
Electrical and plumbing work necessary to renovate the rooms. 40,000.00

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STENOGRAPHIC TRANSCRIPT OF PROCEEDINGS
March 2, 1976

• • •

[79] The Court: Because that is not Mr. Deratany's job. That is up at the next level. He is not in a position to— He cannot make up the budget. That is not his obligation. His obligation is to head up the Department of Vocational Education or Industrial Arts.

Mr. Parrott: I think Mr. Van Loon as probably anticipating the problem, unless he is using it as an example, that we do not know yet that there is a problem with the cost of the equipment that is outlined in the particular memorandum that he is referring to. We have not yet had a refusal from anyone with regard to these particular items that are in the appendix, so that example is not apropos of the situation.

The Court: Thank you again.

Let's shift to the report on South Boston. To set the matter in context, on February—well, going back just a bit, on December 9th, the Court ordered the receivership down at South Boston High School, and District Superintendent McDonough served for a month, made some repairs, and then asked to be relieved of the duties, and the Court appointed the Superintendent, and the original order of December 9th said there should be a plan and chronology for the substantial renovation of South Boston High School filed on or before February 2nd.

On February 2nd, this report, about seven-eighths [80] of an inch, came in, and portions of this report were set out in Court's order of February 11th, which called for the doing of some things during the February vacation. This is in general toward improving the plant at South

Boston High School, but then it also was put over until today for consideration as to whether any four-figure amount has been spent in these lists, plus whether there should be undertaken during the April vacation and June some certain major items.

Mr. Parrott: If I may address the Court on that, as counsel for the receiver, and just to report briefly that Mr. Galeota from the Department of Planning and Engineering, the Superintendent receiver, met yesterday to review some of the plans and work in progress, with Mr. Ford from the Office of Implementation present. He is charged with some responsibility in this regard. He was the substantial author of the February two proposal, as well as Mr. Lambert, who is Miss Fahey's representative at South Boston High. Those people were in attendance.

I would like to report first, if I may, your Honor, that the repainting of the high school has been completed as of yesterday, according to Mr. Galeota, that the other large item we were concerned with over the Christmas holidays is the Formica tables, which have been completed. That is, they were refinished. [81] I would like to say in general, if I may, that so far as the other items which were ordered to be immediately accomplished or accomplished during the February vacation, as well as some of the things left for today's hearing, have already been done.

I would like to say for the record that the work of the Department of Planning and Engineering, its ingenuity, and through the efforts of Mr. Galeota, have done a yeoman job in getting a lot of the work accomplished. It is not like the situation—like the Seabees of World War Two—the difficult you can do right away, and the impossible takes a little longer. They have done most of the difficult, and they are working on some of the things that were at first blush impossible because of finances.

Now, I do not have, and I apologize in advance, a written submission which would track the lists which you attached to your February eleventh order, list A-1, 2, and 3, and 4, as well as B-1 and 2. I could give you very briefly and hopefully, succinctly a report to indicate—or a letter report, to indicate there has been a lot of work accomplished. We cannot report a hundred percent of it has been done or a hundred percent of the February vacation work has been done, but it is generally either accomplished or under bid with the work [82] expected to be done within the next week or ten days.

Then the list of items under B-1 and B-2 are very much, for the most part, under control and planned, in progress.

Then within a day or two, your Honor, I would like to meet one more time with Mr. Galeota, and then we will give you a written submission for the other counsel that would follow List A-1 so that one would not have to jump back and forth between the lists; you would have on the record what has been accomplished, and so forth. If that is all right with the Court—

The Court: It is.

Mr. Parrott: So far as the receiver is concerned, and so far as Mr. Galeota is concerned, there are no problems with the items listed in A-1 through A-4. Some have not been accomplished.

The Court: What about the major items? You see, the order directed that the three-figure items—that is, less than a thousand dollars—be done without hearing, but it set over until today the performance of any items that would cost a thousand dollars or more.

Mr. Parrott: All right, your Honor.

The Court: So that is the principal matter on for today.

Mr. Parrott: All right.

[83] The Court: What, please, should be done?

Mr. Parrott: Those would be the items. Yes. I do want to report that the others should be done. Not all of them are, but they are under control, if you will, and either under —some of them are out for bid, and the bids were being opened this week, and the work was to be accomplished next week, but they are not. There are problems that —they are just not problems, they are being taken care of, so if we get to—if your Honor will go on to List B-1 and B-2—

The Court: Well, no, I am not.

Mr. Parrott: I am sorry.

The Court: You see, I set down for hearing today the question of issuing an order with respect to the four-figure amounts in this list.

Mr. Parrott: Those are on B-1 and B-2, as I understood your order. You finished that portion of the order, Roman numeral portion, by saying these appear on two pages hereto attached and marked List B.

The Court: Well, those are the items designated for April vacation and for June. Now I still have not issued an order with respect to the four-figure items on List A. In other words—

Mr. Parrott: Oh. All right, your Honor. I understand. I understand what you are saying.

[84] The Court: These are relatively minor items authorized by this order of February 11th, but I did not feel that the Court could properly order without hearing these major items, or relatively major items, which is defined in here to be a thousand dollars or more in List A, so the question this morning first is whether the Court should order—these are estimated expenses—heat for the rooms that are being built in the back of the auditorium, which would cost approximately $3,600; whether it should order the installation of a public address system in the gym and locker room.

Mr. Parrott: I have those, and I have the responses for them.

The Court: And what is your recommendation on these?

Mr. Parrott: Let's take those in that order, if we may, your Honor. As to the providing of heat for the rooms in the auditorium, that work, that problem was looked into by Mr. Galeota. His estimate was that it would cost approximately $300, not $3600 to do the work, so he set out to do it. He has completed that project, if you will, your Honor. That is, heaters were installed, with a footnote—

The Court: That suits me. Excuse me.

Mr. Parrott: Some of the heaters have been removed [85] or stolen—we do not know what the situation is—so he is going to get some more, and they will be reinstalled, but it is a less than $1000 item, and we needn't concern ourselves with it if your Honor is satisfied.

The Court: I am, because that is no longer a relatively major item. Next is the public address system.

Mr. Parrott: With regard to that, your Honor, there is already a public address system installed in both the gym—in the gym. It need only be— Only a speaker needs to be installed in the locker room. That is an item that will— Just a minute. That is an item that will—the cost of it is $500, your Honor. It is on order, and will be installed within the next week or ten days. That eliminates those.

Those are the only two large ones on List A-1. There are none on List A-2.

The Court: Well, all right. I just— You know these things. I don't. I was surprised when you said that a speaker would cost $500, that is all. Maybe it does. Mr. Galeota has something to say. Why don't you come up here and join us at the witness stand—

Mr. Galeota: I would be delighted.

The Court: —where you have a couple of—just [86] like Mr. Hurley, whom I had not seen in some months, and the same is true of yourself.

(Mr. Galeota came forward to the witness stand.)

The Court: Does it cost $500 for a speaker?

Mr. Galeota: No, it does not, your Honor. It was more than that. There are two speakers, two types of public address systems over there in the gymnasium, your Honor. One is where they play music and the girls dance or do rhythmic exercises to it. That is one system.

The other system is the public address system. In the public address system, it needs repairing, it needs new wires that have to be drawn through the conduits. The men are working there this morning. It will be completed before the end of the week.

So the cost of $500 is not the speaker. The speaker is the insignificant part. The biggest part of it is in the wiring.

The Court: That, then, I understand, and that is not—

Mr. Parrott: It is below the thousand dollars, your Honor.

The Court: It is less than a thousand dollars. So we turn to page A-3, and it starts off with heating in the auto body shop to prevent water pipes from freezing.

Mr. Parrott: It was agreed yesterday that there [87] is—well, it was agreed that there is some confusion between—a little confusion, maybe I should just say lack of communication, between the receiver and Mr. Galeota on just what is required here. The immediate compromise is going to be that there will be one heater installed, and both parties, if you will, will survey what the real need is down there.

There has not been— There was only one freeze-up during that extreme temperature about a month ago. It is Mr. Galeota's feeling, and the receiver agrees, that the one heater is installed now to take care of the rest of this

season, and it will be an item substantially less than the $2,000 budgeted there.

Mr. Galeota: It would be less than a thousand dollars.

Mr. Parrott: Less than a thousand dollars, your Honor. So we feel that that one has been disposed of.

The Court: All right.

Mr. Parrott: The next item, then, would be under the L Street gymnasium, replace basketball backboards and rims. This was originally budgeted as a $3,000 item. We would say as to that, again, there is some lack of communication as to what is needed. On the original survey and in Miss Fahey's February two proposal, her information was that they needed to be replaced. [88] Mr. Galeota was good enough to survey the situation there. He talked to an athletic supervisor there, who said he was satisfied with the present installation, so rather than order something at this point, your Honor, we would ask that that be deferred until we can study it and report back to the Court. If it is more than a thousand-dollar item, we will ask the Court to enter an order. If it is not, we will not take any more of the Court's time.

The Court: All right.

Mr. Parrott: The next item is repairs and remove broken wood and glass bookcases. That invitation to bid has already gone out. It was due back to Mr. Galeota on the fifth, and he would expect to complete that work within the next week. It is his— What is your budget on that, Mr. Galeota?

Mr. Galeota: We have a complete budget. That combined with some others will not exceed $1900.

Mr. Parrott: The item itself I think in the budget you gave me would be about $500, your Honor, so your Honor can disregard that. The work is in process.

The Court: All right.

Mr. Parrott: I think that gets us to the electrical, the

220-volt line for the stove. Again, Mr. Galeota's estimate is that that work will only cost $800. The [89] invitation bids are due in this coming week, and we would expect the work to be done within a week or ten days.

Mr. Galeota: Yes.

The Court: Can you tell me, please, a little bit more about rooms 1-710 and 1-810? Is that the home economics? I have forgotten.

Mr. Galeota: Your Honor, those are the special needs rooms for the special children. They were transferred from the Michelangelo School. They were down there, and I am very pleased to report to you, your Honor, that those rooms are going to be substantially upgraded and will be in excellent condition, given the time factor of another week or two. We have bids out to improve that.

There was an electric stove ordered for there. Because there was not sufficient current in the building, we cancelled that order. We are going to put in gas stoves. I opened the bids just this morning on the rest of the work for there, and I have awarded the contract as of this morning, and hopefully the work will all be completed within two weeks and make a substantial improvement to those two special needs rooms.

The Court: All right. Thank you. Well, that now ends List A.

Mr. Parrott: Yes, your Honor.

Mr. Galeota: For the record, your Honor, on List A, [90] all the other items that Mr. Parrott has referred to have either been done or are in the process of being done, and we are in excellent shape on it as far as that is concerned.

The Court: I hate to ask, but where is the money coming from?

Mr. Galeota: Good question, your Honor.

The Court: Well, you see, I hear and you heard Miss Lynch and Miss Taylor talking about the pilot ORC, and I raised that the other day when you were not here, because when I had a meeting on Thursday night of last week for the parents—these are the cochairpersons of the CDAC—that was one of the things that they really were terribly upset about, and so the question comes, and that is what I have now to consider, when we are talking about what is going to happen at South Boston High in April or June, it is not a question now of whether or not to do it, these things at South Boston High School; it is a question of how those needs stack up in competition with other things like, you know, what we have been talking about today.

Mr. Galeota: Yes. I am aware of that, and I try to use good professional judgment, your Honor. If there are a lot of minor things that have to be done, I have been taking them out of my own money for tax levy. I [91] have never, in all the years I have been head of the department, going into deficit spending, and I don't intend to this year. I hope that I will come down to hopefully with a balance zero in June. I am on a daily monetary budget basis. However, in anything that is, say, for instance, eight, ten or nineteen hundred dollars or in an advertised category, I just don't have the money to do it, so I have, as in your order, charged it to general school purposes, but also I have in mind the fiscal condition of the city, and I have tried to use professional judgment in that manner, your Honor, by cutting out anything that I felt we could accomplish the same purpose by upgrading the school but at the least possible price.

We have been very successful at doing that, where we had, just for an example— I don't want to prolong it, but I think it is well to know where we had a budgetary item of $15,000 to put Formica tops and refinish all the tables in the cafeteria, that appears in a letter, visit to the school,

and trying to use a little ingenuity of my past experience, we were able to cut that figure in half, so for $6,500, we accomplished the same thing.

Similarly, on the painting project, which we thought would cost thirty-five or thirty-eight thousand dollars, I omitted from the painting contract the painting of [92] storerooms, book rooms, or any of those nonessential items, and we had the job done for $25,000, so it is with this in mind that I have been trying to cut down, because I don't like to see it taken out of general school purposes either, so I have been working in that manner.

The Court. Well, that is really the intent of the order. So now we can turn to List B.

Mr. Parrott: List B-1 and List B-2, your Honor.

The Court: List B-1, because the media do not know what we are talking about. This is a list of authorizations and repairs that it has said could be undertaken during the April vacation, which is going to be from the nineteenth or twenty-third of April.

Mr. Parrott: I would preface my remarks, your Honor, by saying that some of these items have already been accomplished, and we will go to those. Actually, just one has been accomplished. One is under— They are under bid and will probably be accomplished prior to the April vacation, so although that April vacation is a good way to describe it, some of the work will be done in advance of that.

The first item, which is the installation of the effective security system, we have asked for a delay in the implementation time of that. Mr. Galeota is changing [93] security contractors, if you will, the security force, private agency, and the change of date of the contract is to be June 1, 1976. We would ask that the implementation date on that be delayed, instead of April, to June. Further, it is Mr. Galeota's estimate that that work can be done for $1400.

Mr. Galeota: It is in the process of being done.

Mr. Parrott: The work itself is in the process of being done, but before it is totally effective, it would be June one.

The Court: Have in mind that the Court has not ordered that that work be done.

Mr. Parrott: We understand that, your Honor.

The Court: That is what we have the hearing set down for today, to give Mr. Moloney, who is so good at it, a chance to protest, number one, and secondly, to hear other counsel say, "Wait a minute, you should not put in a security system in the auto body shop there if you are not going to put in a security system over at the ORC," you know, the pilot ORC.

Mr. Galeota: For your information, your Honor, this was a contract that I had contracted for long before this came about. This was a contract that is in effect to do over the entire school, and we worked on this last summer. This is part of a contract that is being [94] completed. Whether or not it was on this, it would have been done.

The Court: That I did not realize.

Mr. Galeota: It is under a bond issue item, which had nothing to do with this.

Mr. Parrott: It really ought to just come out of this order or just to stand.

The Court: It is all right just as long as it is understood that I have to hear the parties on these items.

Mr. Parrott: Yes, your Honor. The next item, installation of five duplex wall receptacles, was budgeted at $1,000. Mr. Galeota looked at it, estimated it could be done for $400, so that work is in progress.

The Court: That bodes well. You know, with the deficit, if we can do for $400 what is budgeted at $1,000, maybe we can make some similar savings elsewhere. We know that cannot be—

Mr. Parrott: Mr. Galeota will be glad to point out in

the items we have estimated, agreed on, or will be worked on probably even without the Court's order, there should be a savings of some sixty to seventy thousand dollars over what was originally talked about in December and February.

The next item is the installation of an air line in Shop 3. That has not been done. The estimate on that [95] we do not have at this juncture. The parties in their discussions yesterday agreed as to— I say the parties; those people that I described that were in attendance at the meeting—agreed for the need of the installation of this air line. What it is, your Honor, requires that there be a compressor air line put in to Shop 3 so that portable air compressor tools could be used. Mr. Galeota I believe was satisfied with that explanation, and the receiver is, and recommends that, but we do not really have a—

Mr. Galeota: I have to go back again and take another look-see at the situation.

Mr. Parrott: We do not have an estimate on that. If I could leave it this way, your Honor, that if it is an estimate that comes back more than a thousand dollars, I will ask that it come on for a hearing. If it is less, we will just proceed without the Court's direction.

The large gymnasium, installation of matting for $1400, that is an item that Mr. Galeota looked at, and he has determined all of the matting could be installed, as I understand, in both gyms.

Mr. Galeota: Yes.

Mr. Parrott: Both the girls' and boys' gymnasiums—

Mr. Galeota: I would combine the two.

Mr. Parrott: —for less than the thousand dollars.

[96] Mr. Galeota: No. I would say $800 at each gym.

Mr. Parrott: Yes.

Mr. Galeota: $1600. Less than two thousand.

Mr. Parrott: That shows up on B-1 as a $1400 item next in line, and then down under the first item on girls' gymnasium, it shows up as seven hundred—

The Court: I think it would be a great deal more evident if you were able to file these revisions in writing, give them to the parties so the parties have a chance to understand it more fully. These are not items of urgency in the sense—well, some are not—in the sense we are talking about the April vacation, and this is March second, so that we have a six-week, you know, lead time on it anyhow, so could we perhaps put this information in some written form, send it to the parties, and we could hear it again at a future time.

Mr. Parrott: Yes.

The Court: This way, what can I do, call upon counsel to respond immediately to these changes?

Mr. Parrott: It is going to reduce itself to this. As already indicated, there are going to be very few items more than a thousand dollars. I will make a submission in two parts, those items under and the status report as to those in the progress report and expected [97] date of completion, and those items that remain after estimate at more than a thousand dollars, your Honor, we will have in the second part of the submission.

The Court: And what we have to do is give the parties a chance to express a position on the Court's ordering that that be done.

Now, the order of notice also said that there would be an opportunity to counsel to comment on the plant itself, which is much bigger than the items which were stated today. I think that could also go over to the next hearing, unless there is someone who would object. What I want to do is get Mr. Galeota's report on the situation at Blackstone, because I mentioned that, and it is only about three minutes to one now.

What is the situation there, please? I hear the rest of Blackstone is doing quite well. I mean by that the three-quarters that was not damaged, and some of the parents there I think are anxious that the place be put back in shape if that can be done.

Mr. Galeota: Your Honor, I can bring you up to date. This falls within the scope of the Public Facilities Department and not my department.

The Court: Oh, here we are.

Mr. Galeota: I am on top of the situation, and as recently as a week and a half ago, I talked with Mr.

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 72-911-G

TALLULAH MORGAN ET AL.,
PLAINTIFFS,
v.
JOHN J. McDONOUGH ET AL.,
DEFENDANTS.

MEMORANDUM AND ORDER FOR APPOINTMENT OF HEADMASTER AT SOUTH BOSTON HIGH SCHOOL

GARRITY, J. In its order concerning South Boston High School dated December 9, 1975 the court ordered that the temporary receiver "arrange for the appointment, subject to prior court approval, of a new building administrator and administrative staff, which shall be desegregated" and that "all parties and intervenors . . . cooperate"; and provided for the joint participation of the receiver and the new headmaster in decisions as to the selection of a new administrative staff and the transfer and replacement of

faculty and other educational staff. The new headmaster is thus given an important role in carrying out the court's supplementary orders designed to bring South Boston High School into compliance with the May 10, 1975 desegregation plan, and with other orders entered in this case.

The court and original and successor receivers have conducted an extensive search for a person well suited by training, experience and capacity to head a new administration at South Boston High School.[1] The court interviewed nine applicants; the receivers, many more. Woth court approval, the temporary receiver arranged for interviews of three leading candidates on January 30, 1976 by the members of the South Boston High School Racial Ethnic Parents' Council and the Community District Advisory Council for District 6, the district in which South Boston High School is located. In a joint letter to the receiver, of which a copy was delivered to the court, the two groups recommended the appointment of Jerome C. Winegar as headmaster of South Boston High School, stating in part,

> We were immediately impressed with the extent to which Mr. Winegar commanded respect in his manner and presentation. We feel strongly that this will be of immeasurable value in his ability to communicate with the variety of groups and individuals he will encounter. In addition, the nature and level of his previous and present experiences is such that we believe he is the most apt to be able to cope with and respond to the kinds of problems and issues extant at South Boston High School. As an indication of the response of those involved in the interviews we must indicate that we all agreed initially that the

---

[1] In the interim, the high school has been under the effective, dedicated leadership of acting headmaster James B. Corscadden, who had previously served as assistant headmaster for mathematics.

search for a new Headmaster should be concentrated on the local area and within the system. Mr. Winegar was able to sway us from that posture.

On February 23, 1976 the temporary receiver wrote to the court nominating Mr. Winegar for the position. A resume of his qualifications is attached hereto as Exhibit "A". The court hereby adopts the recommendation of the receiver and the parent and community groups, and approves the nomination of Jerome C. Winegar and orders his appointment on the terms set forth below.

ORDER

The defendant superintendent and school committee, their successors, agents, attorneys and employees are hereby ORDERED to appoint Jerome C. Winegar to the position of headmaster of South Boston High School, with all contractual and statutory rights and fringe benefits, e.g., insurance and retirement programs, of a permanent appointee, for the balance of the current 1975-76 school year and to renew his appointment for the eleven-month periods covering the school years 1976-77, 1977-78 and 1978-79, unless previously discharged for good cause shown. The superintendent shall present Mr. Winegar's appointment to the school committee at its next meeting, at which meeting the school committee shall appoint Mr. Winegar as headmaster of South Boston High School to take effect on or about April 19, 1976; and the school committee's secretary shall issue the customary notice of appointment. Mr. Winegar's salary shall at all times be the same as for other headmasters, currently $28,479, for an elevent-month year.

It is further ORDERED that the persons designated in the previous paragraph shall not remove Mr. Winegar from the position of headmaster at South Boston High

School or transfer him during the time covered by this order, i.e., until after the end of the 1978-79 school year, except for good cause shown.

It is further ORDERED that the city defendants above-named and also the defendant Mayor reimbuse Mr. Winegar notwithstanding conflicting statutes, ordinances or regulations, e.g., section 331.1.(c.) of the school department regulations, for (a) the reduction in salary which he will incur during the balance of the current school year by leaving his position in St. Paul, Minnesota, where his salary is $30,293, to assume headmastership of South Boston High School, (b) all necessary and reasonable expenses which are incurred by him in moving his family and belongings from St. Paul to Boston and (c) his own necessary and reasonable living expenses in Boston until his family is able to move here, provided that all such items of reimbursement shall first be approved by the court.[2] Payments shall be made directly to Mr. Winegar from the School Department 2-09-11 account within 5 days after court approval of his statements of accrued salary differential and out-of-pocket expenses, except that a copy of Mr. Winegar's contract with a moving van company will be presented to the court for its approval and in advance of loading and moving his household goods and payment for this expense shall, at Mr. Winegar's option, be made directly to the moving van company within 48 hours after arrival of the moving van in Boston.

(s) W. Arthur Garrity, Jr.
United States District Judge

---

[2] The best estimate of these amounts is: salary differential $1,000, moving van $1,450 and living expenses $1,600.

WINEGAR, JEROME C.
554 - 11th Avenue N. W.
New Brighton, Minnesota 55112
(612) 636-4529

EXPERIENCE (Current Position First):

Position	*Where*	*Dates of Employment*
Assistant Principal	Wilson Jr. High, St. Paul, Minnesota	Jan. 1974 to Present
Administrator	Evening & Summer School, St. Paul, Mn.	July 1971 – Jan. 1974
Ass't Director – Independent Study	University of Missouri, Kansas City, Missouri Minnesota	Aug. 1970 – July 1971
Research Ass't for Dean of Students	University of Missouri, Kansas City, Missouri	January to July 1970
Research Assistant	Center for Study of Metropolitan Problems in Education, Kansas City, Missouri	June 1968 – Dec. 1969
Teacher of Core, English – Coach of Track & Football	Kansas City, Missouri Public Schools	Sept. 1959 – June 1968

EDUCATION:

Bachelor of Science in Education—Central Missouri State University—June 1959; Majors: English and Physical Education

Master of Arts—Central Missouri State University—August 1963
Major: English

Currently enrolled at the University of Missouri, Kansas City, Doctor of Philosophy in Administration; Minor: Language and Literature—All classwork finished, all written comprehensives and language completed successfully

Other Study:
Missouri Valley College—September 1955 – May 1956
Metropolitan Community College, Kansas City, Missouri, September 1959 – June 1960 and
September 1962 – June 1963

MEMBERSHIPS IN PROFESSIONAL ORGANIZATIONS:
Phi Delta Kappa
National Association of Secondary School Principals
Minnesota Association of Secondary School Principals
International Consortium on Options in Public Education
National Council on Year-Round Education
Innovative Teaching Association

Public School to develop and coordinate a tuition-free summer St. Paul Principals' Forum

MEMBERSHIPS IN OTHER ORGANIZATIONS:
American Civil Liberties Union
National Association for the Advancement of Colored People

PUBLICATIONS:
Only several in-house reports — *To Make a Difference, Doing It All,* and *Dedication in Action.* All three reports of innovative teaching programs for which I was responsible.

OTHER RESPONSIBILITIES IN THE ST. PAUL SCHOOL DISTRICT:
Chairperson, Superintendent's Study Committee on Twelfth Year Alternatives
Chairperson, Superintendent's Study Committee on Year-Round Education
Member, Tax Force on Sexism
Member, District Intra-Cultural Advisory Council
Member, Junior High Learning Center Advisory Board
Member, Institute on Juvenile Justice in Ramsey County
Member, Education Subcommittee—Minnesota Children's Museum
Member, Junior High Alternatives Study Committee

My involvement with alternative programs began early in my professional career. For the initial four years of my nine-year tenure at East High School in Kansas City, Missouri, I was a teacher of so-called academic subjects in a program called Work-Study. It was funded by the Ford Foundation, and it was developed to deal with delinquent and pre-delinquent boys, 50% black and chicano and 50% white. The results of the program are spelled out in a book co-authored by Robert Havighurst and Winston Ahlstrom entitled *400 LOSERS.*

The next five years were spent primarily in the development of creative curriculum and classes in that same school including a non-graded communications program and team teaching kinds of program about disciplines.

I went to graduate school for the following two years, 1968-70, where I had the privilege of studying urban schools with Daniel U. Levine and Edwin R. Bailey, both at the University of Missouri —Kansas City. Dan Levine currently serves as my program advisor on a doctorate in Urban School Administration.

Throughout the period of 1965-70, I served in an advisory capacity with several black youth organizations, specifically Black Youth of America, Soul, Incorporated, and Black Youth on the East Side.

In 1970 I was hired by the University of Minnesota (Minneapolis) to assist in the direction of the Independent Study (Correspondence) Program. I was also involved in the development of the University 'Without Walls' program.

In July of 1971, I was employed by the St. Paul Minnesota,

school and a high school program for the afternoon and evening. The evening school is currently the largest in the state with an enrollment of over 1000 students in four centers.

My current position is as Assistant Principal at Wilson Junior High School, a 7-9 school. I am in charge of program and student personnel. The principal and I were placed here in January of 1974 to straighten out a school in trouble. Wilson is working class, 70% white, 25% black, 5% latin and native American.

We currently have a traditional program for 70-80% of the student population. The other students are involved in an open program or a work-related program. We also offer two half-time alternatives during different trimesters—an academy (disruptive students who are behind in basic skills) and a human relations program. All programs are by choice for both students and staff. We offer over 170 different courses during the year, which is broken into three trimesters. Students enroll in new classes each trimester. Beginning with the third trimester this year, every adult in the building will be serving as an advisor to a group of students.

Incidentally, all of these programs have arisen from a staff which generally did not wish to change two years ago. Hardly a week passes without a new proposal being presented to the curriculum committee by a staff member, a group of students, or one of the seven staff committees in the building.

JCW/mnp

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 72-911-G

TALLULAH MORGAN, ET AL.,
PLAINTIFFS,
v.
JOHN J. McDONOUGH, ET AL.,
DEFENDANTS.

MEMORANDUM AND ORDER CONCERNING APPOINTMENT OF ADMINISTRATIVE STAFF AT SOUTH BOSTON HIGH SCHOOL

June 4, 1976

GARRITY, J. In its December 9, 1975 order concerning South Boston High School, this court ordered that the

temporary receiver "arrange for the appointment, subject to prior court approval, of a new building administrator and administrative staff," that "the new building administrator . . . participate with the temporary receiver . . . in the selection of the new administrative staff," and that "all parties and intervenors in these proceedings, their agents, attorneys and employees, cooperate with the temporary receiver in the performance of his duties . . . ,"

A new building administrator was duly appointed, and he and the temporary receiver thereupon selected Messrs. Timothy B. Murphy and Ronald S. Rosenbaum to be members of the new administrative staff at South Boston High School. These appointments were approved by this court on April 21, 1976, and Messrs. Rosenbaum and Murphy assumed their duties at South Boston High School on April 29, 1976.

Pursuant to the aforesaid orders, the names of Messrs. Murphy and Rosenbaum were submitted to the Boston School Committee at its meeting on May 26, 1976 for appointment to the office of Assistant Headmaster, Group 2. The submission specifically referred to the orders of this court and the court's approval of the appointments. Notwithstanding such notice, the School Committee declined to act, but put the matter over until its then next scheduled meeting of June 2, 1976. At the June 2, 1976 meeting the Committee again declined to act, this time on the premise that it would require interviews with each of the individuals before deciding whether to make the appointments.

Confirming an oral order entered in open court yesterday, on grounds dictated to the court reporter, it is ORDERED that the defendants superintendent and the School Committee and their respective successors, agents, attorneys and employees make the following appointments to the administrative staff of South Boston High School:

Mr. Timothy B. Murphy, Assistant Headmaster —

English, Group 2
Mr. Ronald S. Rosenbaum, Assistant Headmaster —
Social Studies, Group 2

with all contractual and statutory rights and fringe benefits, e.g., insurance and retirement programs of a permanent Group 2 appointee, effective as of April 29, 1976. The superintendent having presented the foregoing appointments to the School Committee, the School Committee is further ORDERED to make said appointments at its next meeting and the School Committee's secretary shall issue the customary notice of appointment. Messrs. Murphy and Rosenbaum's base salary shall at all times be the same as other Group 2 Assistant Headmasters (currently $21,100), with such increases as shall be provided for by contract (e.g., the current contract between the Boston Teachers Union, Local 66, AFT-AFL-CIO and the School Committee), statute or regulation.

s/ W. ARTHUR GARRITY, JR.
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 72-911-G

TALLULAH MORGAN, ET AL.,
PLAINTIFFS,
v.
JOHN J. McDONOUGH, ET AL.,
DEFENDANTS.

MODIFICATION OF ORDER CONCERNING
SOUTH BOSTON HIGH SCHOOL
June 22, 1976

GARRITY, J. The court's order entered December 9, 1975 that the temporary receiver of South Boston High School

arrange for the transfer of full-time academic administrators who do not presently instruct classes is hereby modified with respect to Assistant Headmaster - Math James Corscadden in order that Mr. Corscadden may be appointed Assistant Headmaster of the School.

s/ W. ARTHUR GARRITY, JR.
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 72-911-G

TALLULAH MORGAN, ET AL.,
PLAINTIFFS,
v.
JOHN J. McDONOUGH, ET AL.,
DEFENDANTS.

FURTHER MODIFICATION OF ORDER
CONCERNING SOUTH BOSTON HIGH SCHOOL
August 13, 1976

GARRITY, J. The court's order entered December 9, 1975 that the Temporary Receiver of South Boston High School arrange for the transfer of all full-time academic administrators who did not then instruct classes is hereby further modified with respect to Assistant Administrator — Subject Matter Antonio Gizzi to permit Mr. Gizzi to remain in his current position at the school.

s/ W. ARTHUR GARRITY, JR.
United States District Judge

United States Court of Appeals
For the First Circuit

No. 75-1482

TALLULAH MORGAN, et al.,
PLAINTIFFS, APPELLEES,
v.
JOHN J. McDONOUGH, et al.,
DEFENDANTS, APPELLANTS.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. W. ARTHUR GARRITY, JR., *U.S. District Judge*]

Before COFFIN, *Chief Judge*
McENTEE and CAMPBELL, *Circuit Judges.*

James J. Sullivan, Jr., with whom *Francis J. DiMento, Matthew T. Connolly, Philip T. Tierney,* and *DiMento & Sullivan* were on brief, for appellants.

Robert Pressman, with whom *Laurence S. Fordham, J. Harold Flannery, Foley, Hoag & Eliot, Rudolph F. Pierce, Keating, Perretta & Pierce, Eric E. Van Loon, John Leubsdorf,* and *Nathaniel R. Jones* were on brief, for appellees.

Sandra L. Lynch, with whom *Timothy J. W. Wise*, Assistant Attorney General on brief, for state defendant appellees.

August 17, 1976

CAMPBELL, *Circuit Judge.* This appeal was filed on December 10, 1975, by the Boston School Committee (the Committee) from orders of the district court designating a temporary receiver for South Boston High School and ordering the transfer, without reduction in pay, of certain of its staff. The question before us is whether under the extraordinarily difficult and troubled circumstances con-

fronting the School in the fall and early winter of 1975, the district court exceeded its powers in entering such orders. The instant appeal does not deal with how long such a receivership may properly last.

First integrated by court order in 1974 ("Phase I"), the South Boston High School was serving a racially mixed enrollment in 1975-76 under Phase II, a citywide desegregation plan formulated by the district court and upheld on appeal to this court. *Morgan* v. *Kerrigan,* 530 F.2d 401 (1st Cir.), *cert. denied,* 44 U.S.L.W. 3719 (June 14, 1976). In November, 1975, the plaintiffs, representing a class of all black Boston public school students and parents, moved to close the School, alleging that black students there were being denied a peaceful, integrated and nondiscriminatory education. Following a lengthy hearing and several visits to the School, the district court found plaintiffs' basic allegations to be correct, but declined to close the School, ordering instead that it be placed in the temporary receivership of the court, effective December 10, 1975. The court first named as receiver a senior official of the Boston School Department who was, in fact, the assistant superintendent for the district within which the School was located, but on January 9, 1976, after this appeal was filed, the court appointed Boston's Superintendent of Schools, Marion J. Fahey, as temporary receiver in place of the previous receiver. The stated purpose of the receivership was to effectuate as soon as possible "such changes in the administration and operation of South Boston High School as are necessary to bring the School into compliance with the student desegregation plan dated May 10, 1975 [Phase II], and all other remedial orders entered by the court in these proceedings, e.g., desegregation of faculty and staff." The court directed the receiver to (1) arrange for the transfer of the School's headmaster, full-time academic administrators, and football coach, without reduction in compensation, bene-

fits, or seniority; (2) evaluate the qualifications of all faculty and educational personnel and arrange the transfer and replacement of whomever he sees fit for the purposes of desegregation, without reduction in compensation, benefits, or seniority; (3) file a plan with the court for the renovation of the School; (4) try to enroll non-attending students and establish catch-up classes; and (5) make recommendations to the court relative to certain provisions of the plan. It is the receivership order and the foregoing directions, including especially those for transfer of staff, which are the subject of this appeal.[1]

I

As the district court's primary orders requiring South Boston High School and other Boston schools to be desegregated have been reviewed and sustained, *see Morgan* v. *Kerrigan, supra,* the time is no longer ripe to consider arguments against Phase II itself. The questions now before us are simply whether the lower court properly determined that plaintiff's rights under the desegregation plan were being violated at South Boston High School, and if so, whether the temporary remedies ordered were reasonable and lawful. We answer these questions in the affirmative. Given the lawfulness of the court's desegregation decrees, there is little question that it had the power to take reason-

[1] The Committee also appealed the district court's order imposing a moratorium on acting and permanent appointments by the lame duck School Committee (except with court approval) until January 6, 1976, after the terms of office of its members were to expire. On December 19, 1975, this court declined, after hearing, to stay that order. We knew then that, because of the passage of time, we were in practical effect concluding the appeal. To the extent this aspect of the appeal may not now be moot, we affirm the district court's order for reasons given in our Memorandum and Order of December 19, 1975.

The Committee has for the present waived its appeal from the district court's order that the Superintendent assume power in place of the Committee over two school department offices, the Office of School Security Service and the Office of Implementation.

able steps to ensure compliance therewith and to protect the students attending the city's desegregated schools. The evidence here does not show that the court went beyond what might reasonably be considered necessary to cope with a grave threat to the desegregation plan and to the safety and rights of the black students at South Boston High School.

II

Conditions at South Boston High School which resulted in the challenged receivership and transfer orders are described in the district court's oral and written findings, based on a week-long evidentiary hearing and on affidavits and personal visits to the School. These may be summarized as follows.

Prior to court-ordered desegregation, South Boston High School, consisting of the main building and the L Street Annex, was a white school both as to faculty and students. For example, in 1972-73, of approximately 2200 students, one was black, and of 132 faculty, two were black. From the district court's earlier findings, it seems that the School was involved in many of the segregatory practices which led to the present desegregation plan. *Morgan* v. *Hennigan,* 379 F. Supp. 410, 426, 427, 428, 438, 441-49, 468-69, 475 (D. Mass.), *aff'd sub nom. Morgan* v. *Kerrigan,* 509 F.2d 580 (1st Cir. 1974), *cert. denied,* 421 U.S. 963 (1975).

A significant black enrollment was introduced for the first time in 1974-75 under Phase I. A litany of the problems that ensued that year is to be found in the distirct court's findings. Police in large numbers were on hand from the second day of school in September, 1974; there was tension, disruption, violence, and poor attendance. Black students were often the targets of racial slurs and, on occasion, physical abuse. By the fall of 1975, when Phase II went into effect, South Boston High School was known to be an institution where desegregation was experiencing severe difficulty.

These problems did not abate in the 1975-76 academic year. According to some witnesses they increased. The district court found, "Considering the implementation of the Phase One and Phase Two desegregation plans as a whole, the problems experienced at South Boston High School have been unique in their duration and intensity." A major aspect of the troubles was a continued resistance or imperviousness to integration. South Boston High was found to have remained identifiably white notwithstanding its racially mixed student body. All administrative personnel, assigned to the main building, approximately 45 persons, were white, and the court concluded that in the opinion of its administration, the School belonged only to the white students residing in the easterly part of the district which it served. Out of 100 teachers, 93 were white. The 1975-76 student handbook, distributed to every student and mailed to parents of all registered students, portrayed the School as if white, ignoring its newly integrated status. The handbook singled out for praise the South Boston High School Home and School Association,[2] an organization whose principal if not sole activity for the past two years was to oppose court-ordered desegregation. There was but a single passing reference to the court-established Multi-Ethnic Councils, designed to facilitate the desegregation process.

The court found that the black students who had been assigned to the School were being intimidated and mistreated. There was evidence that black students had been physically attacked without provocation by larger groups of white students. There was evidence that black students had been disciplined for defending themselves while white attackers went unpunished. Black students were found to have been subjected to continuing verbal abuse, and despite

[2] This organization is not to be confused with the Home and School Association of South Boston, a separate body which has joined in the school desegregation case as an intervenor.

a court-ordered ban on racial epithets school officials did little to intervene. In addition to "familiar racial slurs," white students this year have employed the chant " '2, 4, 6, 8 assassinate the nigger apes,' " and, while changing classes, groups of white students often sing " 'bye, bye, blackbird' and 'jump down, turn around, pick a bale of cotton.' " The white student caucus, in a list of demands, requested that music be played over the School's public address system during the changing of classes, since " 'music soothes the savage beasts.' " On numerous occasions, school staff and police stationed inside the building have heard these remarks and chants and failed to take any corrective or disciplinary action.

The court found, moreover, that racial segregation was persisting inside South Boston High School. Black students failed in attempts to join the football team, due in part to the actions of the coach. Black and white students were kept apart when arriving at or leaving School. The races remained separated in the classrooms and the cafeteria. No administrative policy or directive was issued to desegregate classroom seating; a plan for desegregated assemblies remained unenforced; and no effort was made to initiate desegregation in the cafeteria by, for example, having black aides eat together. In fact, the headmaster on one occasion reprimanded a black student who attempted to sit at a table with white students for a "provocative" act.

The district court found that actions by the faculty at South Boston High School had served to undercut the implementation of the court's desegregation orders. The football coach had purposely maintained a white team, and failed to fulfill his affirmative court-ordered obligation to desegregate the team and conduct himself in a non-discriminatory fashion. The court chose not to make findings regarding any other specific members of the faculty, but it did note the attitude of the faculty as a whole. In October,

1975, in response to increasing tensions at the School, the Superintendent's office and the court-created Citywide Coordinating Council sought to send assistance teams into the School. The faculty, however, voted not to cooperate with either group,[3] and the headmaster acquiesced. During the faculty meeting at which one of these proposals was discussed, statements by black teachers about problems at the School drew contradictory comments from white teachers, to the accompaniment of loud applause and cheers of approval. The president of the faculty senate testfied that he had neither read nor seen the court desegregation plan and that he knew of no discussions by the faculty of the court-ordered Racial-Ethnic Parent Councils and their student counterparts. Thus, the court had "doubts whether, as presently constituted, the faculty intends to act as a unit to promote implementation of the court's desegregation plan at South Boston High School."

The court also made findings critical of the headmaster, emphasizing, however, that he had never intentionally discriminated against any of the students. In addressing the faculty at the beginning of the school year, the headmaster had stated in substance that educational concerns would have to be subordinated to discipline and security problems. His response to student complaints of a "prison environment" at the School was to put the primary responsibility for changing the situation on the students. Although he testified that there was learning and teaching in every classroom, the court did not find these claims to be substantiated. When the headmaster was asked if he favored black students participating in athletics in view of the totally white composition of the football team, he stated only that it was a good idea for all students to engage in

[3] On the second day of court hearings on plaintiffs' motion, the faculty voted to reverse its position and cooperate with the mediation board offered by the Citywide Coordinating Council.

sports. In general, while the court judged the headmaster to be well-intentioned, it found there was insufficient exercise of leadership to counteract the adverse attitudes in the School and to remedy the problems attendant on implementation of the Phase II plan.

The district court's central impression was that the services provided at South Boston High were "primarily custodial and only incidentally educational."[4] The court characterized the atmosphere as not so much filled with racial tension, or even any tension, as with a "pervasive lassitude and emptiness." Based on its observations, the court also believed the attendance figures of both students and teachers were greatly inflated. It observed an "inconsiderable amount of instruction" in almost all the classrooms visited. Outside the teaching areas, security personnel predominated, most of whom seemed to expect trouble. In all, the court found the school "devoid of the youthful spontaneity that one associates with a high school . . ., [the students] victims of constant cynical surveillance, unconcerned, uninvolved, and cowed."

III

The district court's findings indicate that, as the court concluded, black students attending the School were not receiving a "peaceful, desegregated education." Rather they were subject to insult, intimidation and continued segregation. As the Massachusetts State Board of Education aptly states in its brief,

[4] The morale of the School was mirrored in its dismal attendance figures. Daily attendance average 60% of enrollment, as compared to the citywide average of 86%, and was the lowest of any district high school in the city and of all high schools except for Boston Trade High. Black students' attendance was on the average significantly lower than white students'. The School's main building had the highest rate of student suspensions of any school building in the city and the L Street Annex the second highest. Suspensions at the two buildings accounted for nearly half of all high school suspensions in the city.

> "The situation at the school was rapidly deteriorating, evidenced both by a falling pupil attendance rate and by the very bringing of the plaintiff's motion. Black students were being driven from the school by conditions there . . . . The denial of constitutional rights, while from more complex sources, was rapidly becoming as effective as if blacks had been barred from entering the school."

Doubtless the difficulty stemmed in no small measure from intentional conduct by private organizations and individuals in the South Boston community.[5] But difficult as was the position of school officials, there was reason to believe that conditions could have been, and still could be, ameliorated by them and that their active and passive conduct contributed to the grave situation so clearly at odds with the court's prior decrees. The Committee's suggestion that the district court overreacted overlooks both the right of black students assigned to South Boston High School to attend, in safety, a desegregated school and the patent urgency of the situation from the viewpoint of all students. The district court could not shut its eyes to what was taking place.[6]

---

[5] The court found the School was "surrounded by evidence of racial hostility". Signs were written on the School buildings and in the surrounding area. "Resist" was painted in large white letters on the south doors of the main building; "Never" was written in large black letters on the wall of the L Street Annex; "Nigger" was written in large white letters on a lamppost on the street adjacent to the School; and racial slurs were painted on the pavement at most street intersections near the School. Inflammatory leaflets, distributed to white students on their way to School, promoted racial tensions within the School. White parents who participated in organizations such as the court-established Racial Ethnic Parents' Councils were threatened and intimidated, their tires slashed and the windows of their homes shattered by bricks. The South Boston Information Center was found to have promoted successful school boycotts, in violation of state law, Mass. Gen. Laws ch. 76, § 4.

[6] Past desegregation decisions provide authority, if any is needed, that the conditions found at South Boston High School were within the district court's power and responsibility to correct. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18-19 (1971), perpetuation of a school's white identification; *Cooper* v. *Aaron*, 358 U.S. 1 (1958), physical and verbal abuse of black students by white students; *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637 (1950), segregation within the school; *Cooper* v. *Aaron*, *supra*, and *Plaquemines Parish School Board* v. *United States*, 415 F.2d 817 (5th Cir. 1969), a severe breakdown in the learning process. It was not necessary to show the school was "burning down", as counsel for the Committee suggested in oral argument, to show a need for judicial action.

The question thus boils down to the propriety of the relief that was ordered. A district court's power to fashion and effectuate desegregation decrees is broad and flexible, and the remedies may be "administratively awkward, inconvenient, and even bizarre." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 401 U.S. 1, 15-16, 28 (1971). Remedial devices should be effective and relief prompt. *Green* v. *County School Board*, 391 U.S. 430, 439 (1968); *Griffin* v. *County School Board*, 377 U.S. 218, 232 (1964). While a receivership has been instituted only once in a reported desegregation case, *Turner* v. *Goolsby*, 255 F. Supp. 724 (S.D. Ga. 1966), receiverships are and have for years been a familiar equitable mechanism. *See* Fed. R. Civ. P. 66; 4 Pomeroy, Equity Jurisprudence § 1330 et seq. (Symons, ed. 1941). They are commonly a vehicle for court supervision of distressed businesses, but have not been limited to that role. The Supreme Court indicated many years ago that a receiver might take charge of a company to enforce compliance with the antitrust laws. *United States* v. *American Tobacco Co.*, 221 U.S. 106, 186 (1911). Receiverships and court-appointed officials with some of the same functions as the receiver here have been approved in other contexts. *See, e.g., Inmates of Attica Correctional Facility* v. *Rockefeller*, 453 F.2d 12, 25(2d Cir. 1971); *cf. Lewis* v. *Kugler*, 446 F.2d 1343, 1351 n.18 (3d Cir. 1971). Masters have been used extensively to formulate plans and recommendations, one of the present receiver's chief functions.

Morales v. *Turman,* 383 F. Supp. 53 (E.D. Tex. 1974); *Hamilton* v. *Landrieu,* 351 F. Supp. 549 (E.D. La. 1972). Finally, there is precedent for a district court having desegregation responsibilities to order personnel shifts. *Morgan* v. *Kerrigan,* 509 F.2d 599 (1st Cir. 1975); *Davis* v. *School Dist. of City of Pontiac, Inc.,* 487 F.2d 890 (6th Cir. 1973).

We thus find nothing impermissible *per se* about any of the actions the court took. The test is one of reasonableness under the circumstances. To be sure, direct judicial intervention in the operation of a school system is not to be welcomed, and it should not be continued longer than necessary. But if in extraordinary circumstances it is the only reasonable alternative to noncompliance with a court's plan of desegregation, it may, with appropriate restraint, be ordered. *See infra.*

The receivership here was a means to enlist without delay top Boston School Department leadership to work in conjunction with the court on the trouble of the School. The court utilized the device to ensure priority attention by senior administrators, under court supervision, to South Boston High's unique problem. The more usual remedies—contempt proceedings and further injunctions — were plainly not very promising, as they invited further confrontation and delay; and when the usual remedies are inadequate, a court of equity is justified, particularly in aid of an outstanding injunction, in turning to less common ones, such as a receivership, to get the job done. *Milltown Lumber Co.* v. *Town of Milltown,* 150 Ga. 55, 102 S.E. 435 (1920); *Columbian Athletic Club* v. *State,* 143 Ind. 98, 40 N.E. 914 (1895). *See* Note, *Monitors: A New Equitable Remedy?,* 70 Yale L.J. 103, 107-13 (1960).

Had the School Committee then in office been cooperative, a voluntary approach might have summoned similar resources without need for a formal receivership. However, the then School Committee had continuously resisted desegregation,[7] and its leaders had advised the court on more than one occasion that they would obey nothing but direct orders. The court had reasonable cause, therefore, to discount the likelihood of effective cooperation. It also had reason to fear that even direct orders to that Committee would, as in the past, be met by resistance, subterfuge, or, at very least, delay. Furthermore, the South Boston High School problem came to a head when the membership of the School Committee was in lame duck status, a situation that we may presume further inhibited the likelihood of prompt action through normal channels. Finally, it bears emphasizing that the principal alternative being suggested to the receivership order was to order that South Boston High be closed. That alternative would not only have involved the abondonment of a large and useful facility but would have necessitated the planning, expense, and inconvenience of finding places for some 2000 students. Without expressing any opinion on the propriety of ordering the School closed, it can be said that the district court demonstrated both restraint and wisdom in selecting the receivership option. For all of the foregoing reasons, therefore, we see the district court's action not as excessive but as reasonably tailored to carrying out the court's responsibilities.

Nor do we find unreasonable the transfer of the headmaster, coach and other staff. Apart from finding overt resistance to the segregation plan by the coach, the court also noted adverse faculty attitudes and a lack of leadership by the School administration in implementing the plan. Given the situation that had developed at the School under existing leadership, the court was entitled to conclude that

[7] *See Morgan* v. *Kerrigan,* 530 F.2d 401, 427 (1st Cir.), *cert. denied,* 44 U.S.L.W. 3719 (June 14, 1976), where we pointed out that "the district court in this case has had to deal with an intransigent and obstructionist School Committee majority. These elected officials engaged in a pattern of resistance, defiance and delay.

a change in command was indicated. The change tied into the appointment of the receiver, giving the latter, in conjunction with the court, the opportunity, after study to bring in administrators and perhaps faculty that seemed best able to cope with the extraordinary difficulties and pressures at the School.

It is true that the court's actions while not reaching beyond the professional School Department, supplanted the supervisory authority of the elected Committee in this area. However, judicial desegregation necessarily involves some displacement of decision-making powers, as we have already witnessed in other aspects of this case, e.g. drawing of district lines, teacher hiring, and so on. And the limitation of decision-making in the schools so as to comply with constitutional rights is not without precedent in other areas. *See, e.g., Epperson* v. *Arkansas,* 393 U.S. 97 (1968); *West Virginia State Board ofEducation* v. *Barnette,* 319 U.S. 624 (1943); *Meyer* v. *Nebraska,* 262 U.S. 390 (1923). The extent of the court's power is limited to what is required to ensure students their right to a non-segregated education, but within that parameter it may do what reasonably it must. *Cf. Griffin* v. *County School Board, supra; Faubus* v. *United States,* 254 F.2d 797, 806 (8th Cir.), *cert. denied,* 358 U.S. 829 (1958); *Kasper* v. *Brittain,* 245 F.2d 92 (6th Cir.), *cert. denied,* 355 U.S. 834 (1957). The fact that a school committee is elected, not appointed, cannot put it beyond the reach of the law. Elected officials must obey the Constitution. *See, e.g., United States* v. *Nixon,* 418 U.S. 683 (1974); *Powell* v. *McCormack,* 395 U.S. 486 (1969); *Reynolds* v. *Sims,* 377 U.S. 533 (1964); *Hawkins* v. *Town of Shaw,* 437 F.2d 1286 (5th Cir. 1971), *aff'd on rehearing en banc,* 461 F.2d 1171 (1972).

Here, contrary to the Committee's assertions, we find no evidence of any intrusion by the district court upon the School Committee's right to determine "educational philosophy" except as that philosophy might impermissibly encourage a racially separate school system. The "limited, general purpose of said receivership," as the lower court stated, is only to bring the School into compliance with the desegregation plan and orders. As the receiver is the Superintendent of Schools, we can see little danger that the receivership will introduce educational policies contrary to those prevailing in the system as a whole. The orders in question were, we find, reasonably limited to matters of proper judicial concern, and, given the problems that have arisen, and in the history, they do not exceed the court's powers.[8]

We would, however, add a *caveat*. Obviously the substitution of a court's authority for that of elected and appointed officials is an extraordinary step warranted only by the most ecompelling circumstances. Those circumstances here were the failure of local officials to give effect to the court's desegregation orders in a meaningful manner. The receivership should last no longer than the conditions which justify it make necessary, and the court's utlization of the receivership must not go beyond the constitutional purposes which the device is designed to promote. We have no doubt that the district court will exercise appropriate restraint in this respect and, in particular, we will give thought to appropriate conditions under which the receivership can be terminated at the earliest opportunity consistent with the rights of children and parents to a peaceful, non-segregated education.

Affirmed.

[8] We have no occasion to act on the statement of the Boston Teachers Union suggesting that "on remand, this Court should order" the new School Committee to respond with proposals to remedy the South Boston High School situation. The matter is not part of the record before the district court and from which this appeal was taken.

ADDENDUM

On March 3, 1976, nearly two months after argument, the Boston School Committee moved to consolidate with the present appeal its appeals from related orders entered by the District Court on December 24, 1975, and December 31, 1975, stipulating "that the only issue presented on such appeals is a determination of the limits of the District Court's remedial powers in a school desegregation case."

Our examination of the record now before us reveals no error. Both orders authorize certain repairs and supplies at South Boston High School that were recommended by appropriate officials of the Boston School Department, including the temporary receiver. The December 24, 1975 order, totalling $23,950, involved such basics as repairs to toilet stalls, water bubblers, torn window shades, and the like; improvements such as painting certain classrooms; and the purchase of certain sports equipment, such as basketballs, mats, and the like. These were to be accomplished before the end of the Christmas recess. More painting, renovation and further repairs were apparently involved in the order of December 31, 1975.

The School Committee does not argue that any of these items are *per se* unnecessary or excessive. Given the problems of the School, the items appear, at least from the record before us, to be intended to repair or make up for deficiencies in normal maintenance and equipment that resulted during the recent period of tension and disruption. Since absenteeism, complaints of a "prison atmosphere," and poor morale generally were prominent among the difficulties the court faced, we cannot say the court went beyond its desegregation powers in taking prompt steps to achieve these repairs and purchases without delay. There is no evidence as to what, if any better procedure was available that would have secured the necessary results over the Christmas recess or soon thereafter, and we assume that the court knew of none. Quite obviously if the School facilities were maintained at a level way below normal, the difficulty of restoring and maintaining a functioning, desegregated School at which learning of any type could occur would be increased. We find no error nor any abuse of discretion in these circumstances. The orders are accordingly affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 75-1482.

TALLULAH MORGAN ET AL.,
PLAINTIFFS, APPELLEES,
v.
JOHN J. McDONOUGH ET AL.,
DEFENDANTS, APPELLANTS.

JUDGMENT
Entered August 17, 1976

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the District Court is affirmed. No costs.

(s) DANA H. GALLUP, *Clerk.*
By the Court:
[cc. Ms. Lynch and Messrs. Sullivan and Pressman.]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 72-911-G

TALLULAH MORGAN ET AL.,
PLAINTIFFS,
v.
JOHN J. McDONOUGH ET AL.,
DEFENDANTS.

MEMORANDUM AND FURTHER ORDER CONCERNING APPOINTMENT OF ADMINISTRATIVE STAFF AT SOUTH BOSTON HIGH SCHOOL

August 20, 1976

GARRITY, J. This order is another in a series of orders establishing a new administrative staff at South Boston High School, following up the general order dated December 9, 1975. The latter order provided that the new administrative staff at the school shall be desegregated. Thus far a new headmaster and four of the eight assistants called for by the size of the school have been designated, and all are white. The receiver, in consultation with the new headmaster and after court approval, submitted to the defendant school committee for appointment as assistant headmasters the names of two well-qualified[1] black administrators, William B. Heath, Jr., and Leslie F. Griffin, Jr., but the school committee has not as yet accepted the receiver's recommendation. The opening of South Boston High School for the school year 1976-77 is fast approaching.

Accordingly it is ordered that the defendants superintendent and the school committee and their respective

[1] Copies of the biographical resumes of Messrs. Heath and Griffin are attached to the original of this order and may be examined in the clerk's office but are not being served upon counsel.

successors, agents, attorneys and employees make the following appointments to the administrative staff of South Boston High School:

Mr. William B. Heath, Jr., Assistant Headmaster
Subject Area (Group 2)

Mr. Leslie F. Griffin, Jr.[2]—Assistant Headmaster
Subject Area (Group 2)

with all contractual and statutory rights and fringe benefits, e.g., insurance and retirement programs of a permanent Group 2 appointee. The superintendent having presented the foregoing appointments to the school committee, the school committee is further ordered to make said appointments at its next meeting, scheduled for later today, and the school committee's secretary shall issue the customary notice of appointment. Messrs. Heath and Griffin's base salary shall at all times be the same as other Group 2 Assistant Headmasters (currently $21,100) with such increases as shall be provided for by contract (e.g., the current contract between the Boston Teachers Union, Local 66, AFT-AFL-CIO and the school committee), statute or regulation.

(s) W. ARTHUR GARRITY, JR.
United States District Judge

[2] Mr. Griffin currently resides in Newton; however, in accordance with the new school department policy, a provision of his contract will be that he establish residence in Boston.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 72-911-G

TALLULAH MORGAN ET AL.,
PLAINTIFFS,
v.
JOHN J. McDONOUGH ET AL.,
DEFENDANTS.

MEMORANDUM AND FURTHER ORDER CONCERNING APPOINTMENT OF ADMINISTRATIVE STAFF AT SOUTH BOSTON HIGH SCHOOL

September 27, 1976

GARRITY, J. This order is the latest in a series of orders establishing a new administrative staff at South Boston High School, following up the general order dated December 9, 1975. An important concern of the court in its order of December 9, 1975, see, e.g., the court's supplementary findings and conclusions filed on December 16, 1975, was the development of innovative programs to remedy the educational void and attendant marked decline in attendance at South Boston High School, observed in the court's two visits, a condition which was impeding implementation of the student desegregation plan dated May 10, 1975. In particular, the temporary receiver and new headmaster were directed to endeavor to enroll students assigned to the school who had not been discharged to attend other schools and to recommend alternative programs for habitually disruptive students.

To assist in coordinating and supervising the development of such programs, both the temporary receiver and the new headmaster recommended a change in the administrative structure of the school whereby one of the assistant

headmaster's positions would be replaced by the position of Director of Program Development. After discussion and consideration, the court approved and adopted this recommendation. Special problems await the new administration of South Boston High School and special measures are needed to overcome them.

To fill this newly created position, the temporary receiver and headmaster recommended the appointment of Geraldine Kozberg, a nationally known educational specialist, who has directed program development in the humanities for the entire public school system of St. Paul, Minnesota, from 1971-76. Mrs. Kozberg's biographical resume is attached hereto as Exhibit A; her qualifications for inclusion in the administrative staff at South Boston High School appear to be outstanding. After discussion and consideration, the court also approved and adopted this recommendation. Accordingly, the temporary receiver appointed Mrs. Kozberg as director of program development at South Boston High School effective September 1, 1976, subject to the approval of the school committee.

On September 7, 1976 the appointment was submitted to the school committee, which unanimously "tabled" it. The transcript of the meeting of September 7 suggests two possible and somewhat contradictory reasons for the school committee's inaction. One member was of the opinion that Mrs. Kozberg's appointment went beyond the purpose of the receivership of South Boston High School (Tr. 138). Another member stated his belief that the creation of a new position at South Boston was not within the school committee's "prerogative" because of the receivership (Tr. 139). Since the September 7 meeting, the school committee has met on September 13 and September 22 without taking further action on the appointment. Another meeting is scheduled for later this week. Meanwhile Mrs. Koz-

berg has been working full time at South Boston High School from September 1.

Hence, it is ORDERED that (a) the table of organization for South Boston High School be changed by the elimination of one assistant headmaster's position and the creation in place of it, effective September 1, 1976, of the position of Transitional Director of Program Development,[1] which shall be a salary group 8 position; and (b) the defendant Boston school committee, at its next meeting after receipt of this order, appoint Geraldine Kozberg as transitional director of program development at South Boston High School, with all contractual and statutory rights and fringe benefits, e.g., insurance and retirement programs, of a permanent appointee, effective September 1, 1976 at the group 8 salary of $27,616.

(s) W. Arthur Garrity, Jr.
United States District Judge

EXHIBIT A

RESUMÉ

GERALDINE KOZBERG

EDUCATION

City College of New York
Bachelor of Business Administration, 1945
University of Minnesota
Bachelor of Science in Education, 1962
Master of Arts, 1969
Doctor of Philosophy (Candidate), present

EXPERIENCE

1971-76 St. Paul's Public Schools, Supervisor of Humanities
1970-71 St. Paul's Public Schools, Social Studies Helping Teacher

[1] This position shall continue on an annual basis until further order of the court; when discontinued, the assistant headmaster's position shall be reestablished.

1969-70 University of Minnesota, Training of Teacher Trainers Project (an urban education program)
1969 St. Paul's Public Schools, Acting Principal
1962-69 St. Paul Public Schools, Teacher
1947-62 Homemaker
1945-47 Abraham and Straus, Brooklyn, New York
Intern, Executive Training Program
Junior Assistant Buyer

PROFESSIONAL ORGANIZATIONS

Alliance For the Arts in Education
Association for Supervision and Curriculum Development
Minnesota Assn. for Supervision and Curriculum Development
Minnesota Council for the Social Studies
Minnesota Council Teachers of English
Minnesota Humanities Association
Minnesota Humanities Task Force
Minnesota State Arts Board, Dance Panel
National Association for Humanities Education
National Council for the Social Studies
National Council Teachers of English
Pi Lambda Theta
St. Paul Arts and Science Council, COMPAS (Community Programs in the Arts and Sciences)

PRESENTATIONS AT MAJOR PROFESSIONAL MEETINGS, 1970-76

International Reading Association, Anaheim, April 1970
Midwest School Social Work Conference, Minneapolis, Sept. 1970
Association for Education of Young Children, Minneapolis, November 1970
International Reading Association, Atlantic City, April 1971
Minnesota Council Teachers of English, Minneapolis, May 1971
Childrens' Book Showcase, New York, April 1972
National Council Teachers of English, Minneapolis, Nov. 1972
Childrens' Book Showcase, Philadelphia, March 1973
Connecticut Dance Festival, New London, June 1973
International Conference on Options in Public Education, Minneapolis, November 1973
National Council Teachers of English, Philadelphia, Nov. 1973
National Science Foundation/USMES, Santa Cruz, June 1974
Alliance For Arts in Education, Boston, October 1974
National Council Teachers of English, Seattle, March 1974
Childrens' Book Showcase, New York, March 1974
International Reading Association, Northlands Council, Bemidji, March 1975
National Science Foundation/USMES, Washington, April 1975
Minnesota Museum Educators' Roundtable, Minneapolis, July 1975
National Council Teachers of Mathematics, Madison, Oct. 1975
National Council for the Social Studies, Atlanta, November 1975
New York Council on Economic Education, Buffalo, May 1976
and other special programs and organizational meetings

PROGRAM DEVELOPMENT 1971-1976

HUMANITIES DEPARTMENT, ST. PAUL'S PUBLIC SCHOOLS

Architecture and Environmental Education
Childrens' Book Showcase
Chimera Theatre Program
China Studies
C/SIP (Community/School Intercultural Program)
Dance Education, Artists in Schools Program (NEA)
Dance Education in the Elementary School (Title IV, Part C)
Economic Education (ETV) —
    Adventure Economics
    Adventure Environment
ESAA Special Arts Project
Inquiry Units in Elementary Social Studies
Law Education
Museum Arts
    Arts Awareness
    African Arts
    China Arts
Oral History Project
Poets in Schools
Project ADAPT (Appreciating Difference in People and Things)
Quest: a program for high potential students
SWS (School Within a School)
USMES (Unified Science and Mathematics in
    Elementary Schools)

In the Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-664.

JOHN J. McDONOUGH, ET AL.,
PETITIONERS,

v.

TALLULAH MORGAN, ET AL.,
MASSACHUSETTS BOARD OF EDUCATION, ET AL.,
RESPONDENTS.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief of Respondents Massachusetts Board of Education, et al., In Opposition to Certiorari.

SANDRA L. LYNCH,
General Counsel,
Massachusetts Board of Education,
182 Tremont Street,
Boston, Massachusetts 02111.
(617) 727-5716
Attorney for the Respondents
Massachusetts Board of Education, et al.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

Table of Contents.

Table of Authorities Cited.

Cases.

STATUTES.

PROCEDURAL RULES.

MISCELLANEOUS.

In the Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-664.

JOHN J. McDONOUGH, ET AL.,
PETITIONERS,

v.

TALLULAH MORGAN, ET AL.,
MASSACHUSETTS BOARD OF EDUCATION, ET AL.,
RESPONDENTS.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief of Respondents Massachusetts Board of Education, et al., In Opposition to Certiorari.

The respondents Massachusetts Board of Education and Commissioner of Education (hereinafter collectively called the Board of Education) oppose the petition for certiorari of the Boston School Committee. The Board of Education is the state education agency with general superintendence over the Committee. Under state law the Board is mandated to see that the Committee complies with state and federal laws pertaining to education, including the United States Constitution.

Mass. Gen. Laws c. 15, § 1G. The Board believes that the orders of the district court here were a proper exercise of judicial power to protect federal constitutional rights. Though not specifically directed to that end, the orders also helped ensure to all students at South Boston High School the orderly education directed by state law.

Although named a defendant in the proceedings below, the Board of Education was found not to have violated plaintiff's constitutional rights. *Morgan* v. *Hennigan*, 379 F. Supp. 410, 476-77 (D. Mass. 1974). The district court retained the Board as a party in the case to participate in the framing of remedies.

Question Presented.

Whether the Court of Appeals for the First Circuit erred in affirming the district court's

(a) findings of fact that Petitioners were in violation of desegregation orders as to South Boston High School and that the gravity of conditions there required a quick and effective remedy, and

(b) exercise of equitable discretion in naming the Superintendent of Schools as the temporary receiver of the school as an appropriate remedy for conditions there.

Statement of the Case.

The Petitioner Boston School Committee asks this Court to review the judgment of the United States Court of Appeals for

the First Circuit affirming an order of the district court appointing the Boston Superintendent of Schools as temporary receiver for a high school because of failure to comply with desegregation orders and affirming certain orders granting other relief.

The receivership order at issue left untouched Petitioners' authority over the 157 other schools in the Boston system and was concerned with only one school, South Boston High School. The order vested the school official with overall responsibility for the system, the Superintendent, with the responsibility for accomplishing desegregation at the school. The difference resulting from the order is that as to the desegregation of that one school the Superintendent reports directly to the district court and not to Petitioners. The order required the Superintendent to replace some of the existing administrators at the school with others more effective in achieving compliance, and to take other actions.

The order at issue was entered in December, 1975, after extensive evidentiary hearings established that there had been failure to comply with injunctions enforcing a desegregation plan, failure to comply with ancillary orders designed to secure compliance with the injunctions, and failure to take sufficient steps to deal with resistance to desegregation at the South Boston High School (A. 11, 22). The evidence established that conditions at the school were extremely grave — with continuing patterns of segregation and discrimination, little if any education occurring, and danger to the physical safety of black students (A. 20-27, 90-109). The order was entered against a background of obdurate resistance by Petitioners to the court's desegregation orders which had resulted once in their being held in contempt and continuingly in noncompliance with implementation orders (A. 30-37, 109).

Specifically, the order named first an Assistant Superintendent and subsequently the Superintendent of the Boston

Public Schools as temporary receiver for the high school. The powers and duties of the temporary receiver were defined with particularity and are set out in Appendix pp. 55-57. The receiver was to transfer the headmaster and football coach and certain others[1] without any loss of salary, benefits or seniority to other duties and to appoint a new building administrator. The receiver also was to evaluate the performance of existing personnel, to file recommendations to improve the physical plant at the school, to attempt to enroll truant students, and to recommend other steps to the court (A. 55-57).

The evidence as to conditions at the school must be set against the history of the case. Petitioners' liability for intentional segregation of the Boston Public Schools is settled, *Morgan* v. *Hennigan*, 379 F. Supp. 410 (D. Mass.), aff'd sub nom. *Morgan* v. *Kerrigan*, 509 F. 2d 580 (1st Cir. 1974), cert. denied, 421 U.S. 963 (1975), as is the propriety of the systemwide desegregation plan ordered into effect, *Morgan* v. *Kerrigan*, 401 F. Supp. 216 (D. Mass. 1975), aff'd, 530 F. 2d 401 (1st Cir. 1976), cert. denied sub nom. *Morgan* v. *McDonough*, ___ U.S. ___, 44 U.S.L.W. 3719 (6/14/76).

Even prior to entry of any remedial orders by the federal court, Petitioners violated Massachusetts Supreme Judicial Court orders enforcing a state law racial balance plan on the Boston schools. *Morgan* v. *Hennigan*, 379 F. Supp. at 418-420, 476-77. Under federal court jurisdiction, Petitioners were ordered to submit a systemwide desegregation plan. On the due date for the plan, a majority of the Committee members refused to file the plan prepared by its staff and did not file any other plan, leading their counsel to withdraw from the case. These Committee members were held in contempt. At the contempt hearing they each stated under oath that they

[1] Although the original order provided for the transfer of other personnel, on recommendation of the receiver other administrator transfers were not made although voluntary transfers were allowed (A. 174-175).

would take no action on their own to bring about desegregation but would take only those steps directly ordered by the court. *Morgan* v. *Kerrigan*, 401 F. Supp. at 226. These same members constituted a majority of the Committee at the time of entry of the orders at issue here.

Numerous acts obstructing implementation of the systemwide desegregation plan ensued. Some of Petitioners' actions and inactions affected South Boston High School. For example, the Petitioners took no action for months on the Superintendent's proposal to establish an Office of School Security Services to deliver programmatic and other support services to troubled schools such as South Boston High School[2] (A. 30-32). The school department Office of Implementation, created to implement the plan, was impeded by Petitioners, who refused to appropriate funds for it, appoint staff to it, or give it supplies (A. 33-35). Petitioners' practice was to do nothing other than what the court explicitly ordered (A. 109). Petitioners also failed to meet their state law obligations, Mass. Gen. Laws c. 77, § 13, to act against persons inducing truancy, although several South Boston groups were notoriously successful in promoting school boycotts at the high school in violation of state law (A. 10, 11, 21, 98).

While Petitioners continued in their posture of resistance to the court orders, the plaintiff black school children encountered intense resistance to the desegregation of South Boston High School. Despite claims that it was a neighborhood school prior to desegregation, approximately 800 white students not from South Boston had been assigned there. *Morgan* v. *Hennigan*, 379 F. Supp. at 426, 475. The school was specifically found to have been maintained as an identifiably white school in violation of the Constitution. *Id.*

[2] At the time of this brief, more than a year later, Petitioners have still not appointed someone to head this office.

The opening of school under the interim desegregation plan in September of 1974 saw the stoning of school buses carrying black children to South Boston High School. State police and local police were stationed in and around the school (A. 8, 21). In December, 1974, a white student in South Boston High School was stabbed. A crowd of South Boston residents surrounded the school and trapped all the black students inside, until a diversionary police operation allowed the black students to leave from the rear of the building (A. 8, 21). *Morgan* v. *Kerrigan*, 401 F. Supp. at 225.

Hearings held in December of 1974 on ancillary remedies concerning school security revealed a number of violations within the school. There was evidence at the hearings that white students roamed the halls chanting racial slurs (A. 9, 21; Tr. 12/13/74, pp. 80-104); that hostile white adults were allowed into the school where they sometimes promoted disturbances (Tr. 12/13/74, pp. 76-113); that segregated meetings of students were held in the school (Tr. 12/13/74, pp. 106-107); and that racial slurs were written on blackboards and walls (Tr. 12/13/74, pp. 100-101). In response to this evidence and at other times the district court entered orders concerning the assignment of police to South Boston High School, access of other people to the schools, use of racial epithets, threatening of violence, and establishment of safe areas around schools and bus routes (A. 11, 22).

In November of 1975 conditions at South Boston High School began to resemble those of the prior December and, in the view of some witnesses, were worse (A. 180). On November 17, 1975, the plaintiffs moved that the court order South Boston High School to be closed and the student body moved to another site or dispersed to other schools. The hearings

commenced on November 21, 1975, and concluded on November 28, 1975.[3]

The evidence established that black students were being denied their right to an orderly desegregated education at South Boston High School. There was no order. Instead, there was danger to the physical safety of black students (A. 180). There was little desegregation. Instead, there was overt discrimination and segregation in the school (A. 181). And there was little education. Instead, a custodial atmosphere prevailed (A. 183). What was being accomplished indirectly was what Petitioners could not have directly accomplished: the maintenance of an identifiably white South Boston High School in violation of the Constitution.

Specifically, black students were subject to physical assaults and continuing verbal abuse by groups of white students and were disciplined for defending themselves while the white students went undisciplined (A. 4, 20, 180). White students chanted "2, 4, 6, 8, assassinate the nigger apes," in violation of the order against use of racial slurs (A. 4, 20). The white student caucus demanded that music be played over the school's public address system because "music soothes the savage beasts" (A. 5, 21). On numerous occasions school staff failed to take any corrective action for such slurs (A. 181). Scurrilous and inflammatory handbills were distributed to white students and slogans in resistance to the desegregation order were painted on the school (A. 99).

---

[3] The procedural due process claims that appear to be raised in the Petition were not raised before the court of appeals. Further, the purpose of the hearings and allegations to be answered were specifically set forth in plaintiffs' motion. The subject of South Boston High School was familiar to the court and counsel. The issue of receivership had been thoroughly briefed by all counsel earlier in the case in response to the U.S. Civil Rights Commission report in August of 1975 recommending the entire school system be placed in receivership due to Petitioners' noncompliance. As the evidence demonstrated, there was an urgent need to provide relief to the school.

The football coach, using a variety of pretexts, excluded black students from the football team (A. 23-26). Despite court orders to the contrary, black and white students were kept separate in classrooms and in the lunchroom (A. 181). In one instance the headmaster reprimanded a black student who attempted to sit at a table with white students (A. 181). The school administration did not direct that classroom seating be desegregated and conducted segregated assemblies (A. 181).

The faculty was hostile to the implementation of the desegregation plan (A. 182). It refused to cooperate with teams from the Superintendent's office or the court-created Citywide Coordinating Council on reducing tensions in the school (A. 182). There were no black administrators at the school (A. 97). Statements by the few black teachers about problems at the school drew contradictory remarks from white teachers, who were applauded and cheered (A. 182). The school handbook, prepared by the administration, lauded the South Boston High School Home & School Association, a group dominated by nonparents and known for its opposition to desegregation (A. 180).

The headmaster did not seem capable of addressing racial problems directly (A. 108-109). When students complained of the prison-like atmosphere, he put the responsibility for changing that atmosphere on them (A. 182). The district court, on taking two views of the school, found the services there to be primarily custodial and only incidentally educational although the headmaster had testified there was learning going on in every room. (A. 183).

The average daily student attendance rate for the school was 60 per cent of enrollment, compared with a citywide average of 86 per cent, and attendance of black students was particularly low (A. 183). The school and its annex had the highest suspension rate of any school in the city and accounted for nearly half of all high school suspensions (A. 183). The

president of the faculty senate testified that the situation was deteriorating and was similar to the atmosphere preceding the stabbing of a student the year before (A. 29). In fact, enrollment at the school was drastically dropping (A. 87, 95-97), creating an urgent situation which led the court to conclude that there would not be much of the school left to keep open if matters continued unchanged (A. 87).

Faced with this evidence of conditions at the school, the Petitioners took no action and made no proposals as to remedies. They instead argued that the plaintiffs' allegations and evidence were part of a sinister plot by the black community to close the school, an argument unsubstantiated by a scintilla of evidence (A. 29). Having offered no solution to the problems, Petitioners now seek review of the orders of the district court designed to address the problems.[4]

Reasons for Denying the Writ.

I. Introduction.

The Massachusetts Board of Education regrets the conditions that led to the receivership and hopes that it may be terminated soon. Nonetheless, in the Board's view, conditions at South Boston High called imperatively for a remedy, and the receivership orders are a reasonable and proper exercise of judicial power in light of the conditions at the school.

While unusual, the receivership orders do not present issues which warrant the granting of review by this Court. The power to appoint a receiver is a recognized equitable remedy

[4] The later orders contained in the Appendix at pp. 166-175, 192-198 are not presented to this Court for review by the Petition but are the subject of a separate appeal pending before the court of Appeals for the First Circuit.

traditionally available to federal trial courts. The decision of the Court of Appeals for the First Circuit affirming the receivership turns on the peculiar facts of this case and is not in conflict with the decisions of any other court of appeals or this Court's decisions. Review by this Court is unlikely to provide guidance for lower courts in future cases.

II. The Orders Were Limited And Were Reasonable.

The characterization of the district court's order as a "receivership" may tend to obscure its limited nature. It is limited because it does not bring in an outside receiver, but utilizes the Superintendent of Schools, whose normal authority encompasses South Boston High School. It is also limited because it is restricted in duration and function to securing compliance with the desegregation plan. It does not involve the district court in nondesegregation matters at the school such as educational policy or philosophy. The functions the receiver is required to perform are, in many instances, identical to those performed by masters. It is also less drastic than the plaintiffs' proposed remedy.

The "receivership" order places responsibility on the Superintendent to secure compliance with the desegregation decree at South Boston High School, while temporarily removing from Petitioners the opportunity to obstruct compliance at that school. The Superintendent, a defendant in this case, with separate counsel on this issue, has not appealed from this order. The specific functions required of the receiver are consistent with the Superintendent's normal authority. While the order requires the appointment of a new headmaster and others, this is consistent with the Superintendent's exclusive authority under state law to nominate all non-civil service personnel in the school system. Mass. St. 1965, c. 208, § 1.

Other actions required of the receiver will also remedy violations of state law at the school. Massachusetts law requires students receive a full 180 days of education a year or equivalent number of hours. Mass. Gen. Laws c. 15, § 1G, and regulations promulgated thereunder. State statutes prohibit discrimination based on race in admission to school and in any courses or advantages offered in a school. Mass. Gen. Laws c. 76, §§ 5, 16. State law requires the offering of physical education and requires that female students receive athletic offerings equal to those available to male students, both requirements addressed by the court's repair and equipment orders. Mass. Gen. Laws c. 71, § 3, c. 76, § 5.

Further, the Massachusetts Board of Education cannot support Petitioners' arguments that the district court "overzealously designed its own high school and equipped it with wall-to-wall educational policy tightly insulated from the democratic process." Petition, p. 11. There have been no orders from the district court regarding programs, courses, curriculum, textbooks, teaching style or any other matters that may be characterized as involving educational policy or philosophy. Petitioners are free to set or not set educational policy for the system, including South Boston High School, as they have always done. The receiver is the chief educational officer of the system, which insures that the desegregation steps taken at the school will be consonant with the system's educational philosophy.

Many of the functions performed by the "receiver" in investigating conditions at the school and recommending curative measures to the court are identical to those performed by masters. See Fed. R. Civ. P. 53(e); Note, *Monitors: A New Equitable Remedy?*, 70 Yale L.J. 103 (1960). Masters have been used to supervise elections, *Schonfeld* v. *Raftery*, 271 F. Supp. 128 (S.D. N.Y.), aff'd, 381 F. 2d 446 (2d Cir. 1967); to develop and enforce remedial plans in employment discrimina-

tion cases, Harris, *The Title VII Administrator*, 60 Cornell L. Rev. 53 (1974); and in numerous civil rights cases to formulate and secure implementation of remedies, *Inmates of Attica Correctional Facility* v. *Rockefeller*, 453 F. 2d 12, 25 (2d Cir. 1971); *Morales* v. *Turman*, 383 F. Supp. 53 (E.D. Tex. 1974); *Hamilton* v. *Landrieu*, 351 F. Supp. 549 (E.D. La. 1972); *Wyatt* v. *Stickney*, 344 F. Supp. 373, 378, 344 F. Supp. 387, 392, 407 (M.D. Ala. 1972) (later history omitted); *Knight* v. *Board of Education*, 48 F.R.D. 115 (E.D. N.Y. 1969).

The limited nature of the district court's remedial orders must also be recognized in light of the motion before the court to close the school. The court declined to close the school as the plaintiffs urged and as the Mayor of Boston had urged the year before (A. 29). Greater interference with the school system would have resulted if the court had granted the motion to close the school. Other high schools were overcrowded and no readily available alternate sites for the school existed. Resolution of these problems would have occasioned far greater intrusions into the management of the Boston public schools. And the rights of black and white students assigned to South Boston High School to an education would inevitably be lost for a period of time.

III. The District Court Orders Were Not An Abuse of Discretion.

In response to the serious conditions at the school, the district court was required to order "quick and effective" relief "necessary and appropriate to put an end to the racial discrimination practiced against [plaintiffs]." *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218, 232 (1964). The facts establishing the urgency of the situation are not contested by Petitioners.

Yet, in a continuing abdication of their responsibilities, Petitioners took no action to help the situation. Contrary to their present complaints (Petition, p. 14), there was full argument in the district court as to possible remedies. At no time, however, did Petitioners propose any remedies, much less use their authority to implement any themselves. Indeed, counsel for Petitioners argued before the court of appeals that the district court had no basis for acting as the school was not burning down (A. 185). It was entirely reasonable for the district court to conclude that Petitioners — who had been held in contempt, who had sworn they would do nothing save what they were ordered to do, and who had continued their resistance throughout implementation — would not ameliorate and might well aggravate the situation (A. 184-187).

Nor was it unreasonable for the district court to conclude that the administration of the school was incapable of bringing the school into compliance. The faculty was hostile to the court orders and remained racially identifiable. The headmaster had had a notable lack of success and, it could reasonably be concluded, would be unable to accomplish compliance.

Under these circumstances, it would have been reasonable for the lower courts to conclude that a limited, temporary receivership was the least drastic effective remedy available. Further injunctive orders to enforce existing injunctions held little promise, particularly given the ability of a complicated organization like the Boston school system to blur lines of responsibility. See *Columbian Athletic Club* v. *State*, 143 Ind. 98, 40 N.E. 914 (1895). Contempt would have been a slow, cumbersome, and at best indirect attempt at a solution. See *Milltown Lumber Co.* v. *Town of Milltown*, 150 Ga. 55, 102 S.E. 435 (1920). The receivership order here may be less intrusive than contempt and injunctions since the authority to resolve numerous problems with implementation impossible to

specify in advance is left with the local official with educational expertise.

IV. The Orders Were Within the Traditional Equitable Jurisdiction Of The Federal Courts.

The district court's orders are consistent both with this Court's decisions and with the doctrines of the law of equity.

This Court's desegregation opinions have stressed repeatedly the breadth and flexibility of equitable remedies available to trial courts. In *Brown* v. *Board of Education* (*Brown II*), 349 U.S. 294, 300 (1955), the Court stated:

> In fashioning and effectuating the [desegregation] decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.

In *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15-16, 28 (1971), the Court stated that a district court's power to fashion and effectuate desegregation decrees is broad and flexible, and that the remedies may be "administratively awkward, inconvenient, and even bizarre." *Green* v. *County School Board*, 391 U.S 430, 439 (1968), required the district courts to fashion prompt and effective relief. This Court recently reaffirmed that "all reasonable methods" are available to secure an effective remedy for constitutional violations. *Hills* v. *Gautreaux*, 96 S. Ct. 1538 (1976).

Receiverships are a familiar equitable mechanism available to secure complete relief. Fed. R. Civ. P. 66; 4 Pomeroy,

Equity Jurisprudence §§ 1330 et seq. (Symons ed. 1941). A receivership was imposed once on a public school for violation of a desegregation order. *Turner* v. *Goolsby*, 255 F. Supp. 724 (S.D. Ga. 1966). While receiverships have most often been used for supervision of failing businesses, the law of receiverships encompasses the use made of receiverships here.

Receivers may be imposed by a court for the purpose of securing compliance with laws and with court orders. In *United States* v. *American Tobacco Co.*, 221 U.S. 106, 186 (1911), this Court noted the permissibility of naming a receiver for a company to enforce compliance with the anti-trust laws. More recently, it has become common in Securities and Exchange Commission enforcement suits to issue receivership orders for the purpose of securing compliance with the securities acts and court orders. *S.E.C.* v. *S & P Natl. Corp.*, 360 F. 2d 741, 750-53 (2d Cir. 1966); *Los Angeles Trust Deed & Mortgage Exchange* v. *S.E.C.*, 285 F. 2d 162, 181 (9th Cir. 1960), cert. denied, 366 U.S. 919 (1961); *S.E.C.* v. *Fifth Avenue Coach Lines*, 289 F. Supp. 3, 42 (S.D. N.Y. 1968), aff'd, 435 F. 2d 510 (2d Cir. 1970); see Farrand, *Ancillary Remedies in S.E.C. Civil Enforcement Suits*, 89 Harv. L. Rev. 1779 (1976). The traditional law of receivership contemplated use of receivers as well to perform acts necessary for compliance with a decree. 1 R. Clark, *Law of Receivers* § 240 (3d ed. 1959).

Receivership is an ancillary remedy, used as a means to reach some legitimate end and not as an end in itself. *Gordon* v. *Washington*, 295 U.S. 30 (1935). In the instant case, receivership was used as an ancillary remedy to secure compliance with the injunctions enforcing the desegregation plan, and was used only after other ancillary relief had been tried. A similar use of receivership was made in *S.E.C.* v. *Keller Corporation*, 323 F. 2d 397 (7th Cir. 1963), which held, at 403:

> It is hardly conceivable that the trial court should have permitted those who were enjoined from fraudulent misconduct to continue in control of Kellco's affairs for the benefit of those shown to have been defrauded. In such cases the appointment of a trustee-receiver becomes a necessary implementation of injunctive relief.

The court also held that the defendants' past conduct gave rise to a reasonable likelihood of future violations and this was sufficient to warrant a receivership. *Id.* at 402.

Where a public interest is involved in a proceeding, such as the constitutional rights involved in the instant case, a court's equitable powers "assume an even broader and more flexible character than when only a private controversy is at stake." *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946); see also *Virginia Railway Co.* v. *System Federation*, 300 U.S. 515, 552 (1937). Receiverships, in particular, are utilized more readily where they would serve to protect the public welfare and not merely to preserve private property rights. *Farmers Grain Co.* v. *Toledo, P. & W. R.R.*, 158 F. 2d 109, 115-116 (7th Cir. 1946). Prior to the 1933 enactment of Chapter 77B of the Bankruptcy Act, receivership of railroads by federal courts was common due to the public interest in proper running of the railroads. See 6 Collier, *Bankruptcy* § 0.04; Sabel, *Equity Jurisdiction in the United States Courts with Reference to Consent Receiverships*, 20 Iowa L. Rev. 83 (1934).

A remedy that is commonly available to private litigants and is frequently used to protect statutory public interests cannot, as Petitioners argue, *per se* be unavailable in enforcing constitutional rights after repeated defaults. Petitioners are not beyond reach of law. *Sterling* v. *Constantin*, 287 U.S. 378 (1932).

Conclusion.

For the reasons argued above, the petition for certiorari should be denied.

Respectfully submitted,

SANDRA L. LYNCH,
General Counsel,
Massachusetts Board of Education,
182 Tremont Street,
Boston, Massachusetts 02111.
(617) 727-5716

Dated: December 8, 1976.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-664

JOHN J. McDONOUGH, ET AL.,
PETITIONERS,
v.
TALLULAH MORGAN, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION AND SUPPLEMENTAL APPENDIX

ROBERT PRESSMAN, ERIC E. VAN LOON
(CENTER FOR LAW & EDUCATION);
Center for Law and Education
Gutman Library, Appian Way
Cambridge, MA 02138

LAURENCE S. FORDHAM, J. HAROLD FLANNERY,
JOHN LEUBSDORF
(FOLEY, HOAG & ELIOT);
10 Post Office Square,
Boston, Massachusetts 02109

NATHANIEL R. JONES (N.A.A.C.P.)

Blanchard Press, Inc., Boston, Mass. — Law Printers

TABLE OF CONTENTS

Table of Citations

Cases

Other Authorities

In the
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-664

JOHN J. McDONOUGH, ET AL.,
PETITIONERS,

v.

TALLULAH MORGAN, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION AND SUPPLEMENTAL APPENDIX

Respondents Tallulah Morgan, et al., black parents and their children enrolled in the Boston public schools, oppose the petition for certiorari of John J. McDonough, et al., and the Boston School Committee.

Question Presented

In view of the unconstitutional conditions and other problems at South Boston High School and the past conduct of school officials, was the district court's order placing the School in "receivership," with a senior school official as "receiver," an abuse of the court's equitable authority?

Statement of the Case

This is a school desegregation case in which the petitioners (the five members of the Boston School Committee) are among the defendants and respondents (class representatives of all black students enrolled in the Boston schools and their parents) are the plaintiffs. On June 21, 1974, the district court held that the Boston system was deliberately segregated.[1] The system was partially desegregated in 1974-75 pursuant to a plan originally mandated by the Massachusetts Supreme Judicial Court.[2] Thereafter, a more comprehensive desegregation plan was implemented in 1975-76.[3]

The relief at issue here was entered following the respondents' filing, on November 18, 1975, of a detailed Motion for Further Relief Concerning South Boston High School, one of 18 high schools and 157 total schools in the Boston system. (A. 1-12)[4] This motion, in part, (a) alleged that since the commencement of desegregation in 1974-75, "black students attending South Boston High School [had] been subjected to conduct interfering with their right to

[1] *Morgan* v. *Hennigan*, 379 F.Supp. 410 (D. Mass.), *aff'd*, 509 F.2d 580 (1st Cir., 1974), *cert. denied*, 421 U.S. 963 (1975).

[2] *Morgan* v. *Hennigan*, *supra*, 379 F.Supp. at 484.

[3] *Morgan* v. *Kerrigan*, 401 F.Supp. 216 (D. Mass., 1975), *aff'd*, 530 F.2d 401 (1st Cir., 1976), *cert. denied sub nom. Morgan* v. *McDonough*, 44 U.S.L.W. 3719 (6/14/76).

[4] The Appendix filed with the Petition is cited A.

a peaceful, desegregated education and threatening their physical safety," and (b) sought "an urgent evidentiary hearing" on the need to close the School and relocate its student body. (A. 1, 3) Recognizing the emergency nature of the matter, the district court scheduled hearings which commenced on Friday, November 21, 1975, continued on November 22, 24, 25 and 26, and concluded with oral argument on November 28.

At the outset of the hearing, the district court denied those parts of respondents' motion seeking to add as defendants certain teaching personnel at South Boston High School. (A. 1, 2, 20, 22) The court also indicated that the purpose of the hearing was to determine "whether the desegregation plan is being implemented . . . at South Boston High School." (A. 22)[5]

The district court ruled on December 9, 1975 (A. 19-44 bench ruling; A. 55-57, written order; see A. 90-109, supplemental findings), finding "that, generally speaking, the plaintiffs proved the allegations in their motion." (A. 20) The district court placed South Boston High School in what it termed the "temporary receivership of the court," although the person initially designated receiver was the Community District Superintendent normally having supervisory responsibility for the School; and this official was later replaced by the Superintendent for the system, a defendant in the main case. (A. 55, 177)[6] The receivership

[5] Petitioners erroneously state that respondents' motion was denied in its entirety at the outset of the hearing. (Petit., p. 6) In fact, the district court did not rule on most parts of respondents' motion. (A. 1, 2, 20, 22).

[6] The question of receivership was not new to the district court or the parties. In June, 1975, the United States Commission on Civil Rights held hearings on the first year of desegregation in Boston. The Commission issued its report in August, 1975. See "Desegregating the Boston Public Schools: A Crisis in Civic Responsibility." The Commission found that the Boston School Committee "ha[d] refused to take affirmative steps necessary to

was to accomplish as soon as feasible "such changes in the administration and operation of South Boston High School as [were] necessary to bring the school into compliance" with the court's desegregation plan and other remedial orders. (A. 55)

The district court also entered orders, *inter alia,* providing for the receiver to (1) replace the administrative staff and football coach, (2) evaluate and possibly replace other staff, (3) file a renovation plan, (4) make efforts to enroll students who had not been attending and begin catch-up classes, and (5) report on certain provisions of the plan. (A. 55-57) The exclusion of the petitioners from the remedy was based in part upon "the history of [the] proceedings" which convinced "the court [that it could] expect no assistance from the school committee as presently constituted." (A. 109)

The court of appeals on August 17, 1976, affirmed the challenged orders[7] in all respects. (A. 176-191) Judge Campbell's opinion concluded that the School was subject to "extraordinarily difficult and troubled circumstances" and that there was "a grave threat to the desegregation plan and to the safety and rights of the black students. . . ." It held that the relief did not go "beyond what might reasonably be considered necessary. . . ." (A. 176, 179) The appellate court noted that based upon past events the

desegregate Boston's public schools successfully" (p. 52), and that "[i]f the School Committee fails to take such actions, the [district] court should consider placing the Boston public school system in receivership." (p. 63) Thereafter, at the direction of the district court, the petitioners, respondents, and other parties made lengthy filings analyzing the factual and legal issues relating to receivership. See "Plaintiffs' Memorandum on Receivership," September 26, 1975; "Memorandum of the Boston School Committee Relative to the Recommendations of the Civil Rights Commission," September 26, 1975; "Rebuttal Brief of the Boston School Committee," October 10, 1975.

[7] The appeal included orders relating to repairs (A. 190-91) as well as the original December 9, 1975, orders.

district court "had reason to fear that even direct orders to [the] Committee would . . . be met by resistance, subterfuge, or at very least, delay." (A. 187)

Certain claims and orders mentioned in the Petition have either not been preserved for review, or are not ripe for treatment by this Court. Petitioners did not present to the court of appeals any claim concerning the timing or form of the hearing on respondents' motion concerning South Boston High School (Petit., pp. 5-6), or views taken of South Boston High School by the district court (Petit., p. 8, n.7). Appeals from later orders concerning South Boston High School are pending in the court of appeals. (A. 145, 172, 192, 194; Petit., p. 10)

Argument

I. The Petition Does Not Establish a Basis For Review Under Supreme Court Rule 19.

The orders challenged here resulted from an interaction of two factors: intolerable interference with the right of black students peacefully to attend South Boston High School as part of a comprehensive desegregation plan, and the petitioners' "default".

The opinions below portray a tragic situation at South Boston High School. Black students were assaulted and subjected to racial epithets within the School, and disciplined for defending themselves. (A. 4-5, 20-21)[8] The School handbook and personnel assignment continued the School's identification as white (A. 180) and there was racial discrimination in an extracurricular activity. (A. 25-26, 180) The suspension rate was the highest in the system and

[8] For the most part, the district court's factual findings were made by reference to the particular paragraphs of respondents' motion concerning South Boston High School. See A. 20-22.

attendance almost the lowest. (A. 95-97) The administrative staff did not enforce particular court orders [see *Morgan* v. *Kerrigan, supra,* 401 F.Supp. at 225, 251 (prohibitions on racial epithets, in-school segregation and discrimination in extracurricular activities; see also p. 65, infra and A. 4-5, 20-21, 181)], or, more generally, provide effective leadership. (A. 182-83). The faculty rebuffed offers of assistance, with the headmaster's acquiescence. (A. 182-83). Concomitantly, the educational program was adversely affected. (A. 92-94, 183) The characterization of the situation by the defendant members of the Massachusetts State Board of Education, quoted by the court of appeals, is apt: ". . . Black students were being driven from the school by conditions there. . . . The denial of constitutional rights, while from more complex sources, was becoming as effective as if blacks had been barred from entering the school." (A. 183-84)

Petitioner's default is illustrated by their approach to this matter. In the district court they first sought a 30-day delay despite the emergency depicted by the allegations (A. 16), and widely known in the community. (A. 179) Then, at the close of the proof, they offered no suggestions for improving the situation, arguing instead that respondents' (black parents' and students') motion for relief reflected "a well-coordinated effort" of students, black community leaders and attorneys to close South Boston High School, rather than a reaction to what had occurred (see pp. 53-54, *infra*),[9] a claim for which the district court found "not a scintilla" of support. (A. 28-30) The court of appeals rejected petitioners' argument that the district court had "overreacted," noting: "It was not necessary to show the school was 'burning down,' as counsel for the

[9] Certain underlying documents not contained in the Appendix filed with the Petition are appended to this brief beginning at page 28.

Committee suggested in oral argument, to show a need for judicial action." (184-85) As detailed below, this tack continued the pattern faced by the district court since its liability finding on June 21, 1974, a pattern characterized by the court of appeals as manifesting "resistance, defiance and delay." (A. 186-87)

The opinion of the court of appeals (A. 176-191) is a complete refutation of the petition. It demonstrates that the challenged actions, affecting one school, are the epitome of a district court's "exercis[ing] . . . [the] traditional attributes of equity power" to "[solve] . . . varied local school problems." *Brown* v. *Board of Education,* 349 U.S. 294, 299-300 (1955). Furthermore, respondents submit, the district court's orders were carefully tailored to address the particular problems in South Boston High School revealed by the evidence.

The use of the term "receivership" to describe the relief may well suggest more than is actually involved. The "receivers" have been superintendents in the system, not outsiders. Given the normal division of responsibility in the system — *i.e.,* the superintendent and other administrators submit proposed plans and nominees to the petitioners for approval — the impact of "receivership" was simply to exclude the School Committee from this approval function as to one school. Moreover, given the nature of the remedial steps required, the exclusion operated as to matters in which the Committee had previously defaulted and obstructed. See pages 16-19, *infra.*

Nor did the challenged ruling infringe on valid federalism concerns. The Massachusetts State Board of Education, which has long struggled to secure Boston's compliance with state elgislation requiring racial balance (pp. 18-19, *infra*), supported the district court's actions in the court of appeals (see A. 183-84). To vest Boston's own Superintendent of Schools with the power to remedy unlaw-

ful conditions was less intrusive than multiplying detailed court directives and contempt proceedings.

The Petition wholly fails to establish a basis for review under Rule 19 of this Court. There is no conflict in the circuits. The argument (Petit., pp. 18-19) that review by this Court will provide guidance for other situations ignores the unique combination of intolerable conduct affecting one school and official default which produced the contested orders. Furthermore, these orders do not, as petitioners assert (Petit., pp. 13-14), conflict with decisions of this Court concerning local control of education. This Court's precedents establish that district courts are empowered to redress infringement of the right of black students to a racially non-discriminatory education, piercing the veil of local control insofar as necessary. In summary, this matter involves exceptional circumstances affecting one school, not a recurring problem warranting review by certiorari.

II. The District Court's Orders Were, in the Circumstances, an Appropriate Exercise of Its Equitable Authority.

A. *The Conditions at South Boston High School*

South Boston High School was before desegregation an almost entirely white school (in 1972-73, one of 2200 students and two of 132 faculty members were black). (A. 179) Intentional segregatory practices created and maintained the School's racial identifiability. *Morgan* v. *Hennigan, supra*, 379 F.Supp. at 426, 427, 438, 440-49, 459-60, 463-66, 468-69, 471-73 (subsequent history omitted).

With the commencement of desegregation in 1974-75, "there was tension, disruption, violence and poor attendance. Black students were often the targets of racial slurs and, on occasion, physical abuse." (A. 179) The

testimony of two black teachers at a hearing on December 13, 1974, reflected: frequent instances of white students roaming through the building chanting "niggers eat shit" (see pp. 31-32, *infra*); the promotion of disruption by white adults allowed in the building during the school day (see pp. 33-35, 37, *infra*); and segregated student meetings within the school (see pp. 28, 30, 35-36, *infra*). "Police in large numbers were on hand from the second day of school in September, 1974; . . ." (A. 179) The district court, on three occasions, entered orders designed to safeguard the safety of students and to prevent racial epithets from igniting violence. (A. 11, 22)

During 1974-75, certain organizations successfully promoted school boycotts in South Boston in violation of state law (Mass. Gen. Laws, ch. 76, §4) in a widespread and open manner. Despite a statutory obligation to act against persons inducing truancy (Mass. Gen. Laws, ch. 77, §13), petitioners did not do so. The district court found that this "created a climate in which more serious violations of law were likely to occur, and have occurred." (A. 10-11, 21-22)

The opinions below paint the following picture of "the extraordinarily difficult and troubled circumstances confronting the school in the fall and early winter of 1975. . . ." (A. 176-77):

Physical Mistreatment of Black Students Within the School

The district court found (A. 21):

> Black students in South Boston High School have been subjected to physical attacks by groups of white students. One or two black students have sometimes been attacked by a much larger group of white students

> without provocation. School and police authorities have detained and suspended all the black students involved in the incident, but only one or two white students. Black students have sometimes been disciplined for defending themselves from an unprovoked attack, while numbers of the white attackers escape any disciplinary measures.

One teacher reported that on October 17, 1975, "[a]t 8:10 a.m. approx. twenty (20) white male students entered my homeroom, #115, and physically attacked three (3) black students. . . ." See pp. 63-64, *infra*. A second teacher reported a white student's striking a black student "over the head with a chair" during a class, without apparent provocation, on November 14, 1975. See pp. 62-63, *infra*.

Racial Epithets Within the School

The district court found (A. 4-5, 20-21):

> Despite [the] ban on the use of racial epithets within the schools, black students in South Boston High School continue to be subjected to verbal abuse.[10] In addition to familiar racial slurs, white students this year have employed the chant "2, 4, 6, 8, assassinate the nigger apes." . . . During the changing of classes, groups of white students frequently sing "bye, bye, blackbird" and "jump down, turn around, pick a bale of cotton." The white student caucus of South Boston High School also issued a list of demands which included the demand that music be played over the

[10] As a result of a district court order of December 17, 1974, concerning security (see p. 65, *infra*), "[t]he student code of discipline [had] been amended to prohibit the use of racial epithets to antagonize others." *Morgan, supra*, 401 F.Supp. at 225. Footnote added.

> school's public address system during the changing of classes for the express reason that "music soothes the savage beasts." . . . [There have been] a number of instances in which school staff and police authorities stationed inside the building have heard such remarks and chants but have failed to take any corrective or disciplinary action. . . .

"An elaborate reporting system was set up for the reporting of non-violent racial incidents such as racial chants and slurs; but nothing was done about the reports." (A. 106)

In-School Segregation

There was substantial segregation of students within the school, in classrooms, the cafeteria, and detention rooms (A. 181), despite the prohibition of the district court's desegregation order. See *Morgan, supra,* 401 F.Supp. at 251. "There [was] no administrative policy as to seating arrangements in classrooms, the matter being left up to the individual teacher. . . ." When a black student sat at a table in the cafeteria with white students, the headmaster viewed it is a provocative act. (A. 100-01)

The Continued Racial Identifiability of the School

While many black students were assigned to South Boston High in 1975-76, school department actions and policies maintained its identification as a white school. "All administrative personnel, assigned to the main building, approximately 45 persons, were white" as were 93 of 100 teachers. (A. 180) The handbook distributed to all students and parents "portrayed the School as if white, ignoring its newly integrated status." (A. 180; see 97-98)

The Football Coach, the Faculty and the Headmaster

"The football coach had purposely maintained a white team, and failed to fulfill his affirmative court-ordered obligation to desegregate the team and conduct himself in a non-discriminatory fashion." (A. 181) The coach removed black players from the team on "the first available pretext." (A. 25-26)[11]

"In October, 1975, in response to increasing tensions at the School, the Superintendent's office and the court-created Citywide Coordinating Council sought to send assistance teams into the School. The faculty, however, voted not to cooperate with either group, and the headmaster acquiesced. During the faculty meeting at which one of these proposals was discussed, statements by black teachers about problems at the School drew contradictory comments from white teachers, to the accompaniment of loud applause and cheers of approval. The president of the faculty senate testified that he had neither read nor seen the court desegregation plan and that he knew of no discussions by the faculty of the court-ordered Racial-Ethnic Parent Councils and their student counterparts. Thus, the court had doubts whether, as presently constituted, the faculty intends to act as a unit to promote implementation of the court's desegregation plan at South Boston High School." (A. 181-182; footnote omitted)

"In general, while the court judged the headmaster to be well-intentioned, it found there was insufficient exercise of leadership to counteract the adverse attitudes in the School and to remedy the problems attendant on implementation of the . . . plan." (A. 183) The failure to act to counteract in-school segregation, the failure to enforce the prohibi-

[11] The desegregation plan provided: "All extracurricular activities and athletic programs shall be available and conducted on a desegregated basis." *Morgan, supra,* 401 F.Supp. at 251.

tion against racial epithets, the disciplining of students for defending themselves, the content of the student handbook, the failure to implement the complaint system, and the non-responsiveness of the faculty have been cited above. In addition, the lower courts found the headmaster to be resigned to the problems facing the school and the subordinating of educational to security concerns. (A. 182)[12]

Enrollment, Attendance and Suspensions

"The morale of the School was mirrored in its dismal attendance figures." (A. 183) The 891 students who had enrolled in the main building as of October 17, 1975, "comprise[d] but 70% of the 1280 students initially assigned . . ., the lowest percentage of projected student enrollment actually enrolled at any high school in the city." Daily attendance in the main building was usually only 60% of actual enrollment, "a figure lower than any district high school, lower than all but Boston Trade High School, and substantially below the citywide figure of 86%." Understandably, in view of the court's other findings, black attendance was particularly low, 44%, 34% and 47% of enrollment on sample days. (A. 95-96)

In contrast, suspensions were extremely high, comprising nearly 49% of all suspensions in the system's 18 high schools in September-October, 1975. The suspension rate for all high school students was 47 per 1000 students; at the two South Boston High buildings it was 357/1000 and 297/1000. (A. 96-97)

[12] The district court cited literature on the importance of the principal in a desegregating school. (A. 42-43) The August, 1975, report of the United States Commission on Civil Rights, note 6, p. 3, *supra,* concluded in part that "schools in which the desegregation process had gone reasonably well . . . are characterized by (strong) administrators who planned ahead and who were both consistent and positive in their policies." (p. 30)

The "Prison-Like" Atmosphere and the Educational Program

The district court found security personnel (police and aides) omnipresent, and the concern for security pervasive. (A. 94-95) When 540 students were in attendance in the main building, 90 state policement and approximately 42 transitional (security) aides were on duty *inside* the building. (A. 92)

The prison-like atmosphere created by the metal detectors through which students must pass when entering the school, the presence of so many personnel responsible for safety, and the problems summarized above, had a predictable, adverse impact on the educational program. (A. 92, 93-94) The depth of the problem was illustrated by the testimony of Headmaster Reid about the lack of an affirmative response by the student body to a nationally known, integrated singing group: "The fact that we had the assembly at all was a major achievement." (A. 108)

• • •

Immediate remedial action was required. The district court observed: "The need for a change in administration at South Boston High School was, in my opinion, urgent, very urgent. Attendance there has been declining at such a rate that if the Court did not step in and take action, in my opinion there would not be much left at South Boston High to keep open if the matter were permitted to go on without drastic change." (A. 87) The brief on appeal of the Massachusetts school authorities, adopted by the court of appeals, stated: "Black students were being driven from the school by conditions there . . . . The denial of constitutional rights, while from more complex sources, was rapidly becoming as effective as if blacks had been barred from entering the school." (A. 184)

B. *The Conditions Outside the School*

The low black attendance and problems within the school were also attributable in part to events outside the School. On the first day of desegregation in 1974-75 many school buses transporting black students and teachers were stoned in South Boston. Some students and teachers were cut and many buses damaged. (A. 8, 21) As their buses passed through South Boston, black students were sometimes faced with "chants such as 'niggers eat shit' and the mimicking of a monkey." (A. 9, 21) As of December 1975, "[r]acial slurs [were] painted on the pavement at most street intersections near the school." (A. 99)

"Inflamatory leaflets, distributed to white students on their way to school, promoted racial tensions within the School." (A. 184) One leaflet addressed "To All the White Kids in All the Southie Schools" read in part as follows:

> WAKE UP AND START FIGHTING FOR YOUR SCHOOL AND TOWN. IT'S TIME YOU BECOME THE AGGRESSORS . ... DON'T BE SCARED BY THE FEDERAL OFFENSE THREATS. A FIGHT IN A SCHOOL ISN'T A FEDERAL OFFENSE . . . BE PROUD YOU ARE *WHITE* & FROM SOUTHIE AND SHOW EVERYONE THAT THIS IS HOW YOU ARE GOING TO KEEP IT NO MATTER WHAT.

Another, addressed to the white football players, stated:

> They make fools out of you by FORCING you to accept a Black Assistant Coach which is part of their plan to take our school. But worse than that you make fools out of Southie and you don't care. If you cared at all or had any Balls you would demand they get rid of the Black Coach and you wouldn't play until they did . At least you'd be doing your part. (A. 99)

Copies of leaflets were brought into the school. (See p. 51, *infra*)

Racial mistreatment in South Boston was not limited to black students. Black teachers were harrassed before the start of the 1974-75 school year. Many black persons were indiscriminately subjected to violence. In one such incident, a mob attack on an innocent passerby resulted in a federal court conviction of one of the perpetrators. See A. 9-10, 21 and *United States* v. *Griffin*, 525 F.2d 710 (1st Cir., 1975).

C. *The Basis for Excluding the School Committee from Participating in the Remedy*

The challenged relief excludes the School Committee from participating in the remedy for the problems at South Boston High School. The district court did this because "[a]ffirmative action and imaginative initiative [will be] required" to resolve the situation (A. 107) and "[o]n the basis of the history of these proceedings, the court can expect no assistance from the school committee as presently constituted." (A. 109) The court of appeals agreed, stating that "[t]he [district] court had reasonable cause . . . to discount the likelihood of effective cooperation. It also had reason to fear that even direct orders to [the] Committee would, as in the past, be met by resistance, subterfuge, or, at very least, delay."

These conclusions on the School Committee's performance were firmly rooted in the record of the Committee's response to this issue,[13] and generally:

Following its ruling that the system was deliberately segregated, the district court on October 31, 1974, entered an order providing for the petitioners' filing of a comprehensive pupil desegregation plan. The order set forth

[13] See pp. 6-7, *supra*.

criteria and established a filing deadline of December 16, 1974. The system thereafter filed progress reports on plan development. However, on December 16, three of the five School Committee members refused to submit a plan prepared by the school department staff, promoting a civil contempt adjudication by the district court. See *Morgan* v. *Kerrigan, supra,* 401 F.Supp. at 225-226; 509 F.2d 618 (1st. Cir. 1975) (denying stay).

On January 7, 1976, the district court found that the contemnors had purged themselves by directing their staff to prepare a new plan to be filed later in January. 401 F.Supp. at 226. When filed, however, this plan was essentially a freedom of choice plan which the district court rejected. See 401 F.Supp. at 228-229. On appeal, the court of appeals found the system plan so clearly inadequate that "if the district court had accepted the January 27 plan, [the court] would have been constrained to reverse." 530 F.2d at 409. The appellate court viewed "it [as] inconceivable that anyone, the School Committee members or the court, could believe that the plan would be effective. . . ." 530 F.2d at 410.[14]

At the contempt hearing, the three Committee members expressed an intention "to obey lawful orders of the Court," but stated in writing that they would take "no initiative or affirmative action to advocate or supplement a plan which in conscience and principle" they opposed. (A. 109; 530 F.2d at 427) During testimony at the contempt hearing, one member stated: "To begin with, I have always complied with the orders of this Court. I intend to do so in

[14] The court of appeals quoted the then chairman of the Committee, who remarked before the vote: "The plan is 'pie in the sky.' It is a contradiction, it is impossible. All of us would love to see a voluntary desegregation system put into effect. It is not a practical reality. Of course, I will vote for this." 530 F.2d at 410, n.11.

the future, but if you ask me to go one step beyond where you direct me, I will not take that step." See p. 39, *infra*.

The district court found that the Committee members had "lived up to their pledge" of no affirmative action. (A. 109) The court of appeals has referred to "an intransigent and obstructionist School Committee majority" which "engaged in a pattern of resistance, defiance and delay." See A. 187, n.7; 530 F.2d at 427.

The conduct of the School Committee upon which the courts below based their conclusions included the following additional matters: (1) failing to appoint two full-time assistants for minority recruitment as required by a remedial order on hiring discrimination; see 388 F.Supp. 581, 584; see pp. 40-41, *infra*; (2) failing to make timely filing of a plan implementation schedule; see 401 F.Supp. at 270; see pp. 41-43, *infra*; (3) failing to make timely appointments of three district superintendents; 401 F.Supp. at 211; see pp. 43-46, *infra*; (4) voting on July 25, 1975, to hold "any further expenditures by the School Department for purposes of school desegregation . . . until they are approved by a specific order of Judge Garrity's court by a budgetary classification designation"; see pp. 46-47, *infra*; (5) recognizing the need for a department to coordinate plan implementation and then opening this office without regular status or funding, which "left [it] slowly twisting in the wind" (A. 33-36); (6) defaulting on the need for addressing security concerns (A. 30-33); See also *Morgan, supra*, 530 F.2d at 430 (obstruction in developing student assignment process).

The School Committee's performance in the federal forum mirrored its earlier obstruction of the Massachusetts Racial Imbalance Act. The Massachusetts Supreme Judicial Court has referred to "years of inaction and delay by the Committee. . . ." *School Committee of Boston* v. *Board of Education*, 302 N.E. 2d 916, 924 (S.J.C., 1973). The district court's liability opinion sets out the details. *Morgan, supra*, 379 F.Supp. at 418-20, 430-31, 440-41, 452-55, 477, 479-80. On March 22, 1974, a Single Justice of the Supreme Judicial Court found that Committee submissions on implementation "manifest[ed] a continued attempt to delay implementation of the Plan" and that its conduct "gives reason to doubt whether the committee, unless expressly ordered by the Court to do so, will reasonably comply . . . ." See pp. 60-61, *infra*.

D. *The Receivership Order Was, In The Circumstances, an Appropriate Exercise of the Court's Equitable Authority.*

In attempting to resolve the grievous situation at South Boston High School, the district court was authorized to employ the full range of equitable powers. *Hills* v. *Gautreaux*, 44 U.S.L.W. 4480, 4484 (1976); *Brown* II, *supra*, 349 U.S. at 299-301; *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15-16 (1971). Receivership is one recognized equitable remedy. See Fed.R.Civ. P. 66; *United States* v. *American Tobacco Co.*, 221 U.S. 106, 186 (1911); *Turner* v. *Goolsby*, 255 F.Supp. 724, 730-31 (S.D. Ga., 1966) (3 Judge Court) (appointing state superintendent as receiver of school system in desegregation case).[15] Furthermore, relief must realistically promise to work effectively and promptly. *E.g., Green* v. *County School* Board, 391 U.S. 430, 439 (1968).

On the facts of this case, the imposition of what the district court termed a "receivership" was a correct application of these remedial principles.

---

[15] See also A. 186, citing cases; J. N. Pomeroy, 4 *Treatise on Equity Jurisdiction*, §§1330-36 (S. Symons, ed., 1941); R. Clark, *A Treatise on the Law of Receivers* (3rd ed., 1959) ("after judgment receivers" are discussed at pages 346-359).

The conditions at South Boston High School were constitutionally intolerable. After more than a year of desegregation, black students were subject to physical attack, exclusion for defending themselves, and racial epithets. There was in-school segregation, the staff composition continued to identify the school as white, the student handbook was written as if black students had not arrived, and there was discrimination in an extracurricular activity. As a consequence, the educational program was adversely affected and a prison-like environment created. Enrollment and attendance figures revealed that black students were being driven from the school. Nevertheless, the faculty rebuffed offers of assistance and the headmaster seemed resigned to the situation.

The district court reasoned that "[a]ffirmative action and imaginative initiative" would be required to address these problems, that it could not, based upon prior events, expect such assistance from the School Committee (A. 107, 109), and that what it termed receivership was therefore necessary. The court of appeals agreed. (A. 186-87)

The record amply supports these conclusions. Only the most affirmative of "affirmative action" could produce even a hope of resolving the problems at South Boston High School. No such effort could be expected from the School Committee. Its members had, *inter alia,* refused to file a plan and, after a contempt adjudication, filed a plainly inadequate plan; made late filings; delayed appointments of personnel; voted to cut off expenditures; and breached agreements regarding particular schools (see *Morgan, supra,* 379 F.Supp. at 430-31). Most significantly, they refused to take any affirmative measures not specifically ordered (pp. 17-18, *supra*), thereby eschewing the very conduct essential here and their constitutional obligation as construed by this Court. See *Green* v. *County School*

Board, supra, 391 U.S. at 437-38.[16] The district court ultimately determined that new administrative leadership would be needed at South Boston High School and that plans must be filed on a variety of matters. (A. 177-78) These were among the very areas in which the Committee had previously defaulted. See pp. 17-18, *supra.*

More conventional remedies did not "[promise] realistically to work. . . ." *Green, supra,* 391 U.S. at 439. Contempt in the past had produced confrontation, not an adequate plan; injunctions had been disobeyed. Moreover, it would not be possible to frame an injunction of "direct orders," spelling out in advance every necessary step to address the problems at South Boston High School. The district court had entered several specific orders concerning The School, but they had not been followed. (A. 4, 8, 9, 11, 20-22, 100, 180-81) "[T]he necessities of [this] particular case" (*Swann, supra,* 402 U.S. at 15) required the assistance of educators anxious to succeed and free of interference by the School Committee. What the district court termed a "receivership" became the vehicle for securing that assitance. As the court of appeals stated: "The receivership here was a means to enlist without delay top Boston School Department leadership to work in conjunction with the court on the trouble of the School. The court utilized the device to ensure priority attention by senior administrators, under court supervision, to South Boston High's unique problem." (A. 186)

The relief entered by the district court was moderate. The court did not, as requested by respondents [and a year before by Boston's mayor (A. 29)], close South Boston High. (A. 187) The Civil Rights Commission had

---

[16] "School Boards . . . then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."

urged that any receivership encompass the whole system (A. 38); the court's action affected one school. The court did not involve an outsider. Instead, it initially chose as receiver the Community District Superintendent normally having responsibility for the School, and later the Superintendent. This was done "because these interventions would least interfere with the normal operations of the school." (A. 109) To have resorted to contempt proceedings and further detailed orders would have involved the court far *more* deeply in local matters than did use of an expert local official.

"Receivership" may be a misnomer here. A receiver is generally "[a]n indifferent person between the parties to a cause. . . ." *Black's Law Dictionary,* p. 1433 (4th ed., 1951); see also J.N. Pomeroy, 4 *Treatise on Equity Jurisdiction,* §1330 (S. Symons, ed., 1941). Here, because the court hewed closely to the normal chain of command, the receivers were high ranking administrators of the school system. The Superintendent, the receiver since January 6, 1976 (A. 144), is a defendant and is by statute the chief executive officer of the Boston schools. Mass. Acts 1972, ch. 1550, §1. The normal division of functions in the system provides for administrative staff to develop proposals and nominate personnel and the School Committee to exercise final approval. Thus, the actual effect of the relief was to exclude the School Committee from several of its normal functions based upon its record of "resistance, defiance and delay" generally *and* as to the very actions deemed necessary to provide relief as to South Boston High School. The relief was thus analogous to orders requiring one group of officials to implement a remedy while others are bypassed or enjoined from interfering. *Bush* v. *Orleans Parish School Board,* 187 F.Supp. 42, 45 (E.D. La., 1960), *aff'd,* 365 U.S. 569 (1961); 191 F.Supp. 871, 879-80, *aff'd sub nom. Denny* v. *Bush,* 367 U.S. 908 (1961); *Gautreax* v. *Chicago,* 480 F.2d 210 (7th Cir., 1973).

The Petition's specific arguments against the receivership are without merit.

First, petitioners assert that the rulings below "disregard . . . the precedents of this Court," apparently those dealing with "local control over public schools. . . ." Petit., pp. 12-14. However, petitioners cite no case even remotely similar to this one. Indeed, the precedents of this Court establish that when school or other officials default, the courts must fashion their own remedial plans. *Swann, supra,* 402 U.S. at 9-10, 16 (implementation of desegregation plan prepared by court expert which revamped student assignment policies in system); *Connor* v. *Coleman,* 44 U.S.L.W 3665-66 (5/19/76) (per curiam) (court reapportionment plan). In *Swann,* default led to displacement of officials in one aspect of the remedial phase, plan development. No principle precludes displacement of defaulting officials in another aspect of the remedial phase, plan implementation.[17]

This Court has upheld relief going as far as or further than what is in question here. *Griffin* v. *County School Board,* 377 U.S. 218, 232-34 (1964) (levy of taxes); *Wright v. Council of City of Emporia,* 407 U.S. 451 (1972) (continuation of joint city-county school system); *Gilmore* v. *City of Montgomery,* 417 U.S. 556, 569, 571 (1974) (review of athletic schedules); *Swann, supra* (redistricting, transportation, grade structure changes); *Bush* v. *Orleans Parish School Board,* 191 F.Supp. 871 (E.D. La.), *aff'd sub. nom. Denny* v. *Bush,* 367 U.S. 908 (1961) (enjoining replacement of school officials by state legislature); same case, 190 F.Supp. 861 (1960), *aff'd,* 365 U.S. 569 (1961) (en-

[17] That the petitioners are elected officials does not insulate them from remedies enforcing the Fourteenth Amendment. See A. 188, citing cases.

joining replacement of school board's lawyer by State Attorney General); *Lee* v. *Macon County Board of Education,* 267 F.Supp. 458 (M.D. Ala.), *aff'd,* 389 U.S. 215 (1967) (requiring state officials to require desegregation of local systems); see *United States* v. *Texas,* 447 F.2d 441 (5th Cir.), stay denied, 404 U.S. 1206 (1971) (requiring state officials to set up sanction system to compel local desegregation).

This case does not involve legitimate claims of local autonomy, but arises from the petitioners' defiance of both state and federal law. For many years, the petitioners prevented implementation of Massachusetts' Racial Imbalance Act (pp. 18-19, *supra*) at the same time as they were violating the Fourteenth Amendment. When desegregation came to South Boston High, it was under twin state and federal court orders, implementing a plan drawn by state authorities [*Morgan* v. *Kerrigan, supra,* 401 F.Supp. at 224; *School Committee of Boston* v. *Board of Education,* 302 N.E. 2d 916 (S.J.C., 1973)]. Since desegregation, the petitioners' violation of federal court orders and constitutional requirements has been matched by their failure, in violation of state law, to enforce school attendance laws against those protesting desegregation (A. 10-11, 21, 98). The laws of Massachusetts by no means authorize local officials to replace education by racial intimidation, and it is therefore not suprising that the Massachusetts State Board of Education supported the propriety of the district court's orders in the court of appeals.

Second, petitioners contend that only one of the court's findings — failure to enforce the truancy laws — involved their conduct, and, therefore, there was an insufficient basis for their exclusion. Petit., pp. 14-16. Petitioners ignore the related district court finding that the promotion of successful school boycotts "created a climate in which more serious violation of law were likely to occur,

and have occurred." (A. 10, 21) More significantly, in framing a remedy, the district court faced the question of the likelihood of Committee cooperation in efforts to address the problem. It could not properly close its eyes to overwhelming evidence from throughout the system that cooperation could not be expected. Finally, the Committee's casting aside of its affirmative obligation is relevant here. The problems at South Boston High School were well publicized. (A. 179) It was the School Committee which had taken actions promoting segregation at the School, which had received orders (never fully implemented) to remove discrimination there, and which now insists on its plenary power over the school system. Petit., p. 4, n.3. Yet, the Committee, true to its pledge, did not act to address the problem. Compare *Keyes* v. *School District No. 1, Denver,* 413 U.S. 189 (1973) (intentional *maintaining* of segregation); see also *Rizzo* v. *Goode,* 44 U.S.L.W. 4095, 4099-4100 (1/20/76).

Third, the Committee complains that it was not given an opportunity, after a finding of violation, to proffer remedies. Petit., pp. 16-17. The issue of remedies was fully argued at the November, 1975, hearings (see Tr., 11/28/75, pp. 8-98), but the School Committee chose to take the position that *no* remedy was warranted. After initially seeking a 30-day delay of the hearing, the Committee in closing argument sought to blame the problem at South Boston High School on a black conspiracy. See pp. 53-54, *infra;* A. 28-29, 184, n.6. Although the School had been in turmoil for more than a year (A. 179), the School Committee had not implemented its own remedial measures, or even complied with those ordered by the district court in previous hearings. (A. 4, 8-9, 11, 20-22, 100, 180-81). Given this approach, the Committee's overall default in the remedial stage of the case, and the need to address the problems promptly,

it was not an abuse of discretion for the district court to move forward without waiting for a further response from the Committee.

The other elements of the relief, to which the Petition refers (pp. 9, 18), were also based upon the "necessities of [this] particular case" as shown by the evidence. Orders were not being implemented in the School, necessitating new leadership. (A. 187-88) Black students were being driven from the School, necessitating efforts, of which the repair orders were a part, to secure their return. (A. 137-38)[18]

Conclusion

In Brown II this Court made a studied decision that the district courts should have a prominent role in the remedial phase of school desegregation cases. The Court reasoned in part: "Full implementation of these constitutional principles may require solution of varied local school problems . . . . Because of their proximity to local conditions and the possible need for further hearings, the courts which

[18] These actions were within the district court's authority. *E.g., Kelley* v. *Altheimer Public School District,* 378 F.2d 483, 498-99, (8th Cir., 1967) (desegregatory transfers of personnel); *United States* v. *Greenwood Municipal Separate School District,* 406 F.2d 1086, 1094 (5th Cir., 1969) (same), *cert. denied,* 395 U.S. 907 (1969); *Lee* v. *Macon County Board of Education,* 267 F.Supp. 458, 484, 488-89 (M.D. Ala.) (equalization of resources), *aff'd,* 389 U.S. 215 (1967); *Plaquemines Parish School Board* v. *United States,* 415 F.2d 817, 831-32 (5th Cir., 1969) ("including repair of broken locks and windows . . . and replacement of fallen blackboards. . . . [And] steps to repair athletic fields, spectator stands and lights which were shown to be in dilapidated condition. . . ."); *Kelley* v. *Altheimer Public School District, supra,* 378 F.2d at 499 (equalization of resources); *Coppedge* v. *Franklin County Board of Education,* 273 F.Supp. 289, 301 (E.D.N.C., 1967) (equalization required although order provided for assignment based on geographic attendance zones), *aff'd,* 394 F.2d 410 (3rd Cir., 1968) (en banc).

originally heard these cases can best perform this judicial appraisal." 349 U.S. at 299. Reliance upon district courts has continued as a theme of this Court's desegregation decisions. *E.g., United States* v. *Montgomery County Board of Education,* 395 U.S. 225 (1969).

The challenged orders, affecting one of 157 schools in Boston, involve the epitome of a district court's grappling with "local school problems," in the best traditions of equity. They have been affirmed by the court of appeals, which has also become familiar with "local conditions" due to the many appeals in this case. The argument that others may receive guidance by this Court's review ignores the unique combination of interference and default by the petitioners which produced the relief. This matter involves exceptional circumstances affecting one school, not a broadly recurring problem.

The Petition should be denied.

Respectfully submitted,

ROBERT PRESSMAN, ERIC E. VAN LOON
(CENTER FOR LAW & EDUCATION);
Center for Law and Education
Gutman Library, Appian Way
Cambridge, MA 02138

LAURENCE S. FORDHAM, J. HAROLD FLANNERY,
JOHN LEUBSDORF
(FOLEY, HOAG & ELIOT);
10 Post Office Square,
Boston, Massachusetts 02109

NATHANIEL R. JONES (N.A.A.C.P.)

Supplemental Appendix

HEARING IN DISTRICT COURT, DECEMBER 13, 1974 (excerpts)

* * *

[75] ALMA CARTER, a witness being called by the plaintiffs [76] being duly sworn, testified as follows:

Direct Examination by Mr. Van Loon:

Q. Would you state your name, please, for the record? A. Alma Carter.

Q. And where are you now employed? A. South Boston High School.

Q. And your job there? A. Teacher, biology.

Q. Mrs. Carter, directing your attention back to Friday one week ago today, to December 6th, could you describe for the Court an announcement heard over the loudspeakers around the second period? A. Okay. It was known there was going to be a white assembly in the building, and after students passed for the beginning of the second hour, roll was taken, and there was an announcement made over the PA system, white students report to the auditorium.

Q. And the white students then— A. Then filed from their classes and went to the auditorium.

Q. Approximately how long did that assembly last? A. Second hour and third hour.

Q. And was it limited to white students or were there white adults as well? A. It was known that there were white parents in the assembly.

[77] Q. Do you know whether the white parents were affiliated with any particular group? A. It was— They were members of the Home and School Association, or the Boston— It was never quite clear whether they were the Home and School Association or the Boston Information Center or Boston Information—you know, South Boston.

Q. They could have been adults from the South Boston Information Center?

A Man: Objection.

A. Yes, sir.

The Man: Your Honor, my name is Timothy Gailey. I am filling in for John Mirick.

The Court: What is your last name, please?

Mr. Gailey: Gailey. G-a-i-l-e-y.

The Court: Oh, yes.

Mr. Gailey: At this point I would like to ask what basis there is for concluding where the white parents came from and so forth. At this point it is hearsay.

The Court: Well, that is a point well taken which we may explore. You will have opportunity for cross-examination, of course.

Mr. Gailey: Well, I don't intend to interrupt counsel.

The Court: All right. Sure.

[78] Mr. Van Loon: Your Honor, perhaps it would be easier—

The Court: Do you have any other questions? Does that conclude Mrs. Carter's testimony?

Mr. Van Loon: Oh, no, your Honor. We have substantially more questions. I think—

The Court: Well, ask them. What are you waiting for?

Mr. Van Loon: I would like to offer into evidence this as Exhibit 1 for the plaintiffs, a communications log produced by the School Department for that day, which shows that it was—which identifies the group of white parents in the rally, just to clarify the record.

The Court: That will be received. It will be marked Exhibit 2, and I will tell you why. We will mark as Exhibit No. 1 the copy of the videotape which was asked for by Mr. Leubsdorf at the conclusion of the morning session. The gentlemen from the Police Department told me that he could make or have made a copy of that tape

rather readily, and that then will be Number 1, and this Number 2.

Can't you get Mr. Pressman to do the handing out while you ask the questions? I want to move along.

Q. (By Mr. Van Loon) Approximately how long did this assembly last? [79] A. Approximately two hours.

Q. And were you—is your classroom in the vicinity of the auditorium where the assembly was held? A. No. My class is on the third floor, on the north wing of the building.

Q. Were you able to tell in any way that the assembly was going on? A. Yes. We could hear the cheers. The sound, I guess, came up the stairway, and the students could hear noises, you know, cheers and things in the assembly, people clapping and that kind of noise.

Q. Could you hear any distinct words or phrases? A. No, we heard no distinct phrases while the assembly was going on.

Q. About what time did the assembly end? A. The assembly ended at the end of third hour. Well, the assembly ended when the bell rang for fourth hour.

Q. And what happened at that time? A. At that time, my class is in the basement of the building. I have a study, and I was proceeding to my office duty on the second floor, and black students were coming from the basement, because there were only black students in the—all the white students are in the assembly. They are coming out of the assembly, all the black students are filing out to go to their next class. As I was [80] coming up from the basement and on the landing above the second—at the second level, black students were held back and white students were allowed to pass. In other words, they separated the two groups. And in the—you could hear people, you know, you could hear milling, people chanting through the building, and you knew that there was something brewing in the building.

Q. You say chanting. Could you hear distinct words? A. Yes.

Q. What were the students chanting? A. "Niggers eat shit."

Q. Were there this— A. Continually.

Q. Was this a sporadic one or two? A. No. It was like a, you know, like a chant goes on for three, four, five or six, you know, as long as they were marching in a group, they chanted, you know, they were chanting it.

Q. Did you have some equipment — any audio-visual equipment —

The Court: Excuse me. Is that the same words repeated?

The Witness: "Niggers eat shit. Niggers eat shit. Niggers eat shit."

The Court: I mean that was what they were saying.

The Witness: Yes.

[81] Q. Were there any other phrases chanted by these groups? A. At this particular time I didn't hear any other phrases.

Q. Could you estimate the number of students, and I presume— Am I correct that all these students were white? A. Yes.

Q. And could you estimate the number of students that were engaged in this activity? A. I could not see the students. I only heard the chants at that time.

Q. Approximately how far away were you? A. Oh, I assume that they were coming from the other side of the auditorium. I couldn't—you know, you could just hear a chant. I had absolutely no idea at that time how many students there were making the noise, but it was loud enough for me to hear from the other side of the building.

• • •

[85] Q. At another time did you find yourself caught in the audio-visual room with white students outside? A. Twice

I have used the audio-visual room for safety. On this particular morning, Monday, I was showing a film to my second hour class, and I took the film down at the end of second hour to take it to the audio-visual room to leave it so that I would have it again for fourth hour. I had to go back and pick it up, and as I proceeded down the hall, I heard coming up the stairwell the chant again, "niggers go home," a different chant, "niggers go home," then it changed to "niggers eat shit." I had absolutely no idea how many students it was at this time, because it was again coming up the stairwell, and I am at the top of the stairwell.

Q. This is the school day following the day of the white [86] assembly that you have described? A. Yes. This is Monday.

Q. Monday, the ninth of December. A. The ninth.

Q. Of this week. A. Yes. I immediately went down the hall, because I knew there would be policemen or aides or something in the hallway, and I knew they were coming up the staircase. When I got to the hallway, there was no one, no police, no aide. I continued to hurry down the hall, knowing that I could find safety perhaps in the audio-visual room, but they were moving a bit faster than me. I did manage to get into the audio-visual room, which is about —at the base of the steps there is about this amount of space. (Indicating) I pulled the audio-visual—

Q. Excuse me. This amount. About the size of a closet? A. About this. (Indicating) About the size of a closet. And I went in and pulled the audio-visual—the projector and the stand I was using in front of me, assuming that I could use this for protection if need be. The students passed by the door, as I was, you know, getting the stuff in, and—

Q. Did they see you there? A. They saw me there. They began to call me "black bitch." They had, you know, different—you know, "nigger," [87], "there's a nigger."

There was a white male teacher up about six stairs as these go here. He came to my assistance and stood beside me there. I was very— It was a very tight space, so I could hardly even move up the stairs, but he did come and stand with me.

Q. In this group that passed, were there students or adults as well? A. They were students, students that I recognized, students that I have in class, some of them.

Q. As far as you know, were any disciplinary actions taken against any of these white students? A. As far as I know, there was none taken.

Q. You say you recognized some of the students? A. Well, they were students in my classrooms.

Q. Do you know their names? A. Yes, but— Yes, you know, I do, but there were thirty-five or forty students, and they were just running through the—you know, they were roaming in this particular area, and there— I did recognize two students that I did have in class. Yes.

• • •

[90] Q. (By Mr. Van Loon) On Monday morning of this week, Mrs. Carter, were you in the office at any time of the day? A. Yes. As I have stated, I do have office duty at fourth [91] hour, and I am in the office at that time.

Q. And were there white adults in the vicinity at that time? A. There were. Yes. The office was crowded. The seats were completely taken. There were white females sitting in the office.

Q. Were you surprised for any reason to find these white adults in the building on Monday morning? A. As a black instructor, we generally are not—we don't have the facilities or whatever to stay for staff meetings. The van comes, and we have to leave when the van comes. And on Friday there was a staff meeting after the assembly—

Q. This is a faculty meeting? A. This is a faculty meeting, yes.

Q. On Friday afternoon? A. On Friday afternoon, which we did not attend, and we were told on Monday morning—we generally find out what has happened in the staff meetings, the faculty meetings, and it was told that Dr. Reid had stated there would be no more meetings, no more rallies of that type, and no more groups of parents coming into the building at that time. On Monday, the mothers were, you know,—they were there on Monday morning.

Q. Did they move at some time from the office to some place else in the building? A. At that time they left the office, because the office [92] was so crowded we could not even carry on the regular, you know, goings—administrative things that had to be done in the office. They were moved to the auditorium. I'm sorry, that was Friday. On Monday they were moved to the library for a meeting.

Q. And were they there for a long period of time? A. They were there until the end of the day.

Q. And did their presence have any discernible effect, as far as you could see, on the conduct of students within the building? A. Yes. Certainly.

Q. What was that? A. When the bells rang for passing of classes, students would congregate in large groups, thirty-five to forty at times, not passing. They refused to move. They would be chanting things. If black students tried— Policemen have blocked the ways, certain areas, so that black students couldn't pass through them because the groups in effect were hostile groups. They were shouting things, the "niggers eat shit" chant that they carry on. The building was visibly tense. Everybody was very tense.

Q. Did the white parents remain for the full school day? A. For the— When we left, when the black students left on the bus and we left on the van, the white parents were still in the building.

[93] Q. Were they still in the library at that time?

A. They were still in the library at that time, and the faculty meeting was scheduled to be held in the library.

Q. And was the faculty meeting then held in the library? A. On Monday— The next day, I was told that because the mothers refused to move from the library, the faculty meeting was held in the auditorium, and at that time the mothers, or women, that were in the library decided that they wished to speak to the faculty members, and at this time—this was all white faculty, because all the black faculty had to leave—they came into the auditorium, into the faculty meeting, and the white teachers of South Boston High School walked out of the meeting.

• • •

[106] *Cross-Examination by Mr. Gleason:*

XQ. Mrs. Carter, were there assemblies from time to time of black students? A. There has been one black assembly, yes.

XQ. And would there be congregations of black students in the corridors? A. Going to the assembly? Yes.

XQ. No, not just on that occasion, but on other occasions. A. Any time—

XQ. You spoke of congregations and groups of white students— A. Yes.

XQ. —gathering in the corridors. A. Yes.

XQ. Would that happen with black students? A. This would happen any time there was a type of—you know, when there were segregated meetings called over the PA system, students that were left in the room became upset.

XQ. Became what? A. Upset. You know, tense. Why these types of meetings were [107] allowed to go on.

XQ. Would groups of white students be left—would there be— You said there was one black assembly? A. There was one black assembly, yes. In their rooms.

XQ. In three and a half months, or three months. A. Yes.

XQ. In home rooms? A. No, not in home rooms. The students file to their second hour class, and generally after the roll was taken, they then filed to the auditorium for the meeting.

XQ. And would that be— There would be white meetings and black meetings? Separate? A. To my— There were two white meetings, two all-white meetings, one black, all white—one black meeting.

XQ. Are there assemblies of both blacks and whites? A. There has been one black—you know, integrated assembly, and that was a sophomore assembly, for all sophomores. There have been several all-senior assemblies, and all the seniors are white, so that would be an all-white assembly.

XQ. But I had the impression that frequently there would be congregations of white students in corridors and blocking the way and so forth. Has that been true— Am I correct that that is a frequent occurrence? A. In the last two weeks that is a frequent occurrence.

• • •

[112] AFTER RECESS

(Witness sworn.)

ARTHUR ALEXANDER, a witness called by the plaintiffs, being first duly sworn, testified as follows:

Direct Examination by Mr. Van Loon:

Q. Would you tell us your name, please, sir? A. My name is Arthur Alexander.

Q. And where are you employed? A. I am employed at South Boston High School.

Q. In what capacity? A. In the language department. Spansh.

Q. As a teacher? A. As a teacher, yes.

Q. And for how many years— Is this your first year teaching? A. No, this is my fifth year.

Q. Directing your attention—thinking back to Monday morning of this week, could you tell us where you were in the opening hour of school? A. Yes. I was—it was the second period, which is planning period, and I was going on my way down from where I taught to study hall, and some mothers were coming in, and—

Q. Excuse me. You were coming to the— A. Yes. I was going down to study hall, and there were some [113] mothers coming in, and some of them and the girls had some shouting. I heard slurs on both sides. The mothers were saying something to these girls. They were— There were some racial slurs on both sides.

Q. What was the race of the mothers that were coming in? A. Well, I heard one woman said, "nigger," and I heard the girls saying that "you white trash you," and I tried to sort of quiet, you know—to get the girls to, you know, to go on back down to study hall at the time, because at that time I have duty down there at the time.

Q. And this was in the vicinity of the front door, of the entrance to the school? A. Yes, the front door, entrance to the school.

Q. And these were white parents? A. These were white parents, yes.

Q. And were you with the students—you then went to the study hall, where your next assignment was? A. Yes, I went to study hall, because I have always tried to break up things if I hear it, and I tried to get the girls down to the study hall at the time.

Q. And was there an effect on the students in the study hall from this action? A. Yes, there was quite an effect, because they said, well, if these people are women, you know, they are grown women and they are doing this, what

can they expect of [114] their children? I mean, their children must do the same thing to us too because they are doing this to us.

Q. In other circumstances and not limited at all to Monday of this week, in your normal teaching duties, is your teaching ever interrupted from sounds outside? A. Yes. During the week of Thanksgiving, the white students had several assemblies, and they walked out at will, and in their walking out, the corridors were rampaged. I remember one day just a little before Thanksgiving, there was such—there was a group of students walking down, and I was so afraid I told my black students, I said. "Sit here and don't get excited. Keep quiet." and my door was open and cans were thrown in and racial slurs—

Q. What specifically did you hear? A. —were yelled. "Nigger go home. Go back to Africa. I am going to get you. You are one of those I am going to get. You are not going to be here by Christmas." I mean "after Christmas. I am going to get you."

• • •

HEARING IN DISTRICT COURT, DECEMBER 27, 1974 (excerpts)

• • •

[125] JOHN J. McDONOUGH, being first duly sworn, testified as follows:

Examination by the Court:

Q. Would you please state your name and address, Mr. McDonough? A. John J. McDonough, 250 Gallivan Boulevard, Dorchester, Massachusetts.

Q. And when were you first selected as a member of the School Committee? A. Your Honor, I was elected in 1965, and I served my first term in 1966-67.

Q. Thank you. Now, have you—

The Court: I want Mr. McDonough also to have a copy of the questions.

The Witness: I do have them.

Q. Oh. All right. Now this first question had to do with what affirmative steps, if any, you will take to promote the peaceful implementation of the state court plan currently in effect, and you said that "I will continue to obey lawful orders of the Court, but I will take no initiative or affirmative action to advocate or supplement this plan, which in conscience and principle I oppose, based on my belief that the plan increases racial antagonism and endangers the safety of school children."

When you say that you don't take any affirmative action, does it follow that you will take no action at all, or won't you do something to endeavor to reduce [126] racial tensions? A. Let me answer one question at a time, your Honor.

Q. Fine. A. To begin with, I have always complied with the orders of this Court. I intend to do so in the future, but if you ask me to go one step beyond where you direct me, I will not take that step.

Q. Well, let's take a situation such as a desegregation plan. They don't all have to be three inches thick, but they come pretty thick, I gather, and the Court, by approving a plan and directing it to be carried out, intends that things necessary to carry it out be done. Does your answer mean that you would do such things? A. Yes, your Honor. For the record, I have complied with the Court's orders; any request that the Superintendent of Schools asked of the committee I voted for; and, as the chairman pointed out, questions of teacher aides, bus monitors, anything that he asked for he got as an affirmative vote from me, because I believe that even though I didn't agree with the plan, I wanted to make sure that it was implemented with due

safety, with thoughts of due safety for all the children of the city of Boston, and on that basis I did vote for it even though I did not agree with it.

Q. Is there anything which you have done to help bring about the safety of the children? Can you think of anything that you have done along those lines? A. Your Honor, I have not interfered in any activity of the Superintendent or any order of this Court, with the view that the safety of the children would be paramount, and I will continue to follow that direction.

• • •

HEARING IN DISTRICT COURT, April 23, 1975 (excerpts)

• • •

[12] The Court: All right. The motion of the School Committee is denied, and the order that there be two full-time recruiters for black teachers which was entered back on January 28, 1975 is reaffirmed, basically because the order of January contemplates a long-range effort and the establishment of an office which will be able to increase the number of applicants. We know from what Mr. Kennedy has said and what Mr. Connolly has said that there is just no way of predicting with certainty how many black teachers will be needed, and if the one-for-one hiring ratio is going to be more successful in September of 1975 than it was in September of 1974, I believe that the programs and procedures set up by the Court's order on January 28th have to be carried out.

Last fall, you will recall that there were very diligent efforts made for a one-to-one hiring ratio of black and white teachers that were new to the system in September of 1974, but the actual percentage fell far short of 50 percent black teachers, because there just were not enough qualified black teachers available, and to guard against that

danger and real possibility, it is necessary to set up an office that will convey the message to the students in black —to black students in teachers' colleges and elsewhere that they really have [13] a genuine employment opportunity in the schools of the city of Boston, provided they are qualified to teach here and meet the various qualifications.

So those are the reasons for the Court's denial of that order, and the Court further orders by way of a follow up that as soon as convenient, perhaps within a week, I would expect that the School Committee—in fact, I won't say I expect it; I order that the School Committee send a simple letter to the clerk identifying who these persons are. We should have the names of the two recruiters and the fact that they have indeed been employed.

• • •

HEARING IN DISTRICT COURT, June 2, 1975 (excerpts)

• • •

[68] The Court: What I am getting at, and in your absence, actually, so you will know exactly, I mentioned that the last item on the agenda this morning would be this requirement under the timetable for implementation. I am looking at page 102, at the bottom of the page there, and quoting: "The School Department shall develop and file on or before May 23, 1975 a detailed plan of activities, responsibilities, and internal scheduling for the implementation of the plan ordered by the Court in the available time period, similar to that filed as Section VII of the plan filed by the School Committee on January 27, 1975."

Now do you know the status of that requirement?

Mr. Connolly: I would have to check on that, your Honor.

The Court: Well, with whom?

Mr. Connolly: Mr. Tierney. I had assumed that he was handling that aspect of it.

[69] The Court: Well, here is what please do between now and the next session. Ask him about it and to look into it. Are you familiar offhand with the type of scheduling that I made reference to as having been in Section VII?

Mr. Connolly: I am rereading it, yes, your Honor.

The Court: Yes. Well, the identical provisions were in the December 16th plan, and they were carried over to the January 27th plan, and they constitute a number—well, it is not that many pages really, twenty pages approximately. It talks about the implementation process and schedule. The reason I bring it up at this time is because that is quite close, I think, to the matter of a schedule of desegregation expenditures. I think they are similar, unless there is a schedule in here that deals with expenditures exactly, which there may be. I think it is in here.

Well, you know, these subheadings, materials and supplies and transportation and external— Here it is. Financial Considerations. It follows Internal School Safety and Security. This is sub L, as in Longfellow. It is the last of the particular tables. It says there, 1, Activities, sub a, Assessment of Montetary Needs. This was to be for the period July 1, 1975 to June 30, 1976. Then it has:

"Based upon prior year desegregation expenditure [70] pattern and Phase 2 plan."

Next: "Determined by personnel involved in the current desegregation budget and expenditure control."

"Determined by school officials in charge of the various desegregation activities described in Parts C through L."

Then sub b, Determination of Revenue for Desegregation Activities.

Just a second. Would you hand this to Mr. Connolly, because this is, to me, very important. This is another copy. That is in the January 27th plan.

It says here, Determination of Revenue for Desegregation Activities. First is General School Purpose Budget. Next, Supplementary Appropriations from the Mayor and City Council. Next, Commonwealth of Massachusetts. Next, Federal Government. Next, Foundations.

The next thing is Responsibility. The next subheading is Cooperation. I don't want to read the whole thing.

Next is Timetables, and it finally winds up: "It should be noted that the above financial considerations relate only to a segment of the entire desegregation cost and process. There are other costs beyond the control of the Boston School Committee: construction of new schools, acquisition of facilities for school conversion, crossing guards, police and other public safety service."

[71] The reason I bring this up at this juncture is that my understanding of the School Committee proposal itself is not substantially different from the Mayor's motion. I don't know whether you are prepared at this time to respond to that or not, but have in mind either for now or next hearing, number one, the May 23rd filing, and where it is I don't know, and two, this type of information, which comes right out of the School Committee plan.

Now Mr. Tierney is back. Do you know about the May 23rd filing and where it is and what its status is?

Mr. Tierney: Unfortunately I do not, your Honor.

• • •

HEARING IN DISTRICT COURT, June 18, 1975 (excerpts)

• • •

[7] [The Court] Now one other matter before I turn to this matter of student assignments. The plan calls for the School Committee to appoint area superintendents forthwith, and we know from reading the papers that there has been considerable action taken in that direction, but we

still don't have area superintendents for the nine school districts, that is, the eight community districts and the one citywide district.

So long as the question of a stay of the Court's order of May 10 was unresolved, I didn't want to bring up this point, but it has now become essential, because the Court of Appeals has ruled that this plan will go into effect in September, so I will now specify forthwith. Instead of just leaving it an unspecific date, I now set the date as being a week from today, and, more specifically, the School Committee is ordered to designate or appoint these area superintendents by a week from today, and we will have another hearing on this case generally a week from today, at ten o'clock on the 25th.

I know from the media, of course, that there has been some problem as to the duration of these appointments. There is nothing in the order talking about the fact that they should be appointed to—at least for a period that would carry the particular areas through the opening of schools, and certainly until the end of this year. We all know the problem. At least, we all know what it says in the media. [8] That is, there is, understandably, a desire on the part of the School Committee to appoint people who are acceptable to and who will be working closely with the Superintendent-Designate, Miss Fahey. On the other hand, she does not assume office until midway through the summer, so there is a problem there.

Surely the School Committee will make an effort, I assume, to appoint area superintendents whose tenure will carry beyond Miss Fahey's assumption of office. It is certainly not going to do much good to have a person in a position of that importance for just a matter of weeks and then have a new person come in to become oriented in the responsibilities of the new position and have that orientation period practically come up to the time when school starts. So it is a practical problem.

I certainly hope that the committee appoints people who will carry on with some continuity, but there is nothing in the order on that and I am not making any order. It just seems to be common sense that whoever is appointed should be in office at least through the beginning phases of the desegregation next fall, but that is just hortatory. The only order portion of it is that we have got to have names, and the order is that the defendants appoint nine people on or before Wednesday of next week. We have got to get moving on this matter. I assume you realize that. There are six [9] area superintendents currently, and presumably they will be simply assigned to serve in one of the nine districts, so it will be three new appointments. So that is specific.

I will turn now— Yes, Mr. Connolly.

Mr. Connolly: May I have an objection to that, your Honor?

The Court: Could you state what the objection is?

Mr. Connolly: The objection is based on the appeal, your Honor. It is part of your order. We intend to raise that before the Court of Appeals, the order requiring us to appoint area superintendents.

The Court: Of course.

Mr. Connolly: I don't want to waive it by not objecting at this point.

The Court: Well, fine. Don't sit down for a minute, because I just have to be certain. That is what the stay is all about. Of course you have a right to appeal everything but the orders that were promulgated on May 10 have to be carried out.

Mr. Connolly: I understand that, your Honor, but I don't want to waive this before the Court of Appeals when it comes up for argument in September.

The Court: Oh, don't worry about that. You are never

waiving a thing. You would not be waiving anything. It is just that that is what the denial of the stay meant. It means [10] that you have got to go forward. All these things can be appealed, of course, and I would not think that you are waiving, but I just want to be sure that you understand that despite the pendency of the appeal, it has to be done.

Mr. Connolly: I understand that.

• • •

HEARING IN DISTRICT COURT, July 31, 1975 (excerpts)

• • •

[10] [The Court] Later this morning we will talk about what's to be done with respect to the forms of appeals or review unit. According to the newspapers, I don't think I have [11] gotten anything official in a way of filing, but according to the newspapers, the School Committee said: Well, we won't do anything about it unless the Court orders directly.

And that's of course the way, that's, if you call it the phase that we are in now, what should be called Phase 1⅞, whereas the school will do only what they are ordered directly to do by direct order.

If you say "spend $1.43 on something, we will spend $1.43; otherwise, we have some doubt about it."

Well, number one, this order is considerably more general than to tell the members of the School Committee to obey the direct orders of the Court. Since the last hearing, Mr. Tierney was kind enough to send along to me a copy of an order which was voted by the School Committee dated July 25, 1975. This is their order, and this, by the way, is being used by the city to hold up every expenditure in this case.

There are ample ways to defeat segregation. I should think an excellent way would be to say: We are not going

to spend any money, or we are going to provoke or develop a situation where everybody has got 100 percent good intentions, but there is just no money with which to carry them out.

The court appointed experts weren't paid when [12] they came down to the city hall. Routine, no money, no one going to pay any money any more. This is not going to happen.

We have not come this far in this case to be thwarted by a resurrection of some of the bad faith that characterized the operation of the schools a number of years previous to June '74.

Here is the order:

"That there be no further expenditure of School Department funds for Phase 2 desegregation costs beyond what Mayor White had approved in his July 14, 1975, submission to the Boston City Council."

And a further paragraph ordering: "That any further expenditures by the School Department for purposes of school desegregation not be made unless and until they are approved by specific order of Judge Garrity's court by a budgetary classification designation." End of vote.

Well, that causes me to take a look at one of the provisions in this court order dated May 19, and there are other similar orders elsewhere. It says, and I quote from Page 100: "That the Defendants, their officers, agents, servants, employees and attorneys shall take all actions necessary to accomplish the steps set out below on or before the dates listed."

A little affirmative action is necessary here [13] by the School Committee. I am reminded of the story about the military people or the practice sometimes in the military, that two people debating whether something should be done, and the answer is: "Is that a direct order?"

And then the superior officer says "That's a direct order."

Then the junior officer says: "Well, all right, I will do it."

This case is not going to work that way, and it is not going to have to work that way. The Supreme Court is too clear on the obligations of the School Committee.

Here we go back to June 21, 1974, which is the order as of that date, and it just tracks the language of the Supreme Court:

"The Defendants are ordered to begin forthwith the formulation and implementation of plans which shall eliminate and reform segregation in the public schools of Boston."

And there are so many cases cited, and they are known to the Defendants just as well as they are to the Plaintiffs. So there has got to be, and I know that in many areas there has been a disposition to go through with this. By that I mean a disposition to carry out the orders that are going to result in desegregation of [14] the schools.

And I just can't let the School Committee tell me they are not going to spend any money until I find out what budgetary classification the particular expenditure belongs into or unless the expenditure of each dollar is ordered in response to the question "Is that a direct order?"

Well, the direct order has been already given. It was given over a year ago. The School Committee has to take all necessary steps, and that includes the expenditure of money, and that includes the payment of the court appointed experts.

They were paid right up along regularly until we reached Stage 1⅞. I think we will be in court every day for the next 20 days if need be. I will tell you I am going to be here, and we are going to go through with this. So playing games at this stage isn't going to change the effect of the order.

Mr. Tierney: Your Honor, the School Committee's vote, as I understand it, is predicated or necessitated by the Mayor's budget cuts. Laying the full blame on the School Committee for the lack of money is, I believe, unwise and unwarranted.

I have attempted to decipher the memorandum of Mr. Maloney from Mr. Wall, and I am going to take it up [15] with my clients as soon as I have an opportunity this week. But again, your Honor, I would urge you to consider the fact that the employment of people during the summer planning, all of these efforts that are necessary for the opening of schools requires the people be paid. And it is my understanding that this money is not being made available to the committee in their budget by the Mayor. Now, I am sure Mr. Maloney will have a comment on my comment; but, again, your Honor, I don't believe full blame can be laid at the doorstep of the committee.

The Court: Has the committee the funds? It has $126,000,000 has it not?

You are not going to spend that? You are because you are going to do it under court order. I said last year: We will spend the money needed for desegregation of the schools opening in the fall. And, of course, the thinking is: We will have no money to keep the schools open next spring.

I said a year ago, I would face that problem when it arose and I say it again.

You are ordered, and your clients are ordered to spend the necessary funds for planning purposes and for carrying out this Court's plan. Now that is a direct order, if that helps.

The theory behind it, I hope everybody understands, [16] and that is that an ounce of prevention is worth a pound of cure. Are we going to spend $1,000 for planning in the summer and save $10,000 for broken windows and buses and police overtime in October? That's what we are

discussing here. Whether there are going to be planning expenditures which are very, very minor in comparison to the—I don't know the adjective I wish—but you know the type of expense that we all hope to avert in the fall. Each dollar spent today is worth many times a dollar spent in October or November trying to cope with emergencies that may then arise. So spend it now. You have got it. And you have got to do it this fall just as you did it last fall.

Now any submissions, and so forth, you want to file, I will in the future, as I always have in the past, consider. But we cannot have frustration of the court's order by an intrahouse—meaning intramunicipal government—dispute. That's all I will say at this time. We get back to this point. I don't want to hear from you, Mr. Gleason, at this point.

I was trying to get non-controversial things at this point. This is a whole big topic.

I said, however, before—and we spent a good time on this Monday afternoon, I think it was, on this point. That doesn't mean that the School Committee has been [17] ordered by the Court to spend every dollar it can lay its hands on and label it desegregation. I have not in the past ordered the expenditure of any funds that were not reasonably required. In fact, I have used that expression "reasonably necesary," and that's still the standard. But I haven't had any evidence so far the School Committee is squandering money—certainly not on any planning in connection with Phase 2. And that's what I'm concerned with currently.

When are these teachers' raises going to be employed and paid; and whether the planners are going to have to go home because there is no money for planning? Well, I get back to this. That's a whole major subdivision, and I will hear all of you—Mr. Tierney, Mr. Gleason or anyone else that wants to say anything on any aspect of it. But that's really a bigger topic.

• • •

(3) Hearing in District Court, November 22, 1975 (excerpts)

[8] Yvonne Slaughter, Sworn

(The following affidavit of Yvonne Slaughter was read by the witness:

I am a Senior (12th grade) student at South Boston High School. Last year I attended the Jeremiah Burke High School. I am black.

• • •

Cross-Examination by Mr. Haroz

[50] XQ. Referring for a minute to Paragraph 2 in your affidavit, you stated that the sheets of paper that you referred to often got into the school. Can you tell us what you have seen on those sheets of paper? A. Like, "We are going to get rid of the niggers." It is stuff like that. It is a whole lot of things. I don't remember all of those things that were there.

XQ. And you have seen these actually in the classrooms? A. Yes, because, like, when the bell rings, they forget them on the desks and I know what they are, right, and so I just go over and look at them.

• • •

Hearing in District Court, November 28, 1975 (excerpts)

• • •

[42] Mr. Tierney. What is the administration's view of this testimony, your Honor, and of these allegations? Dr. Reid testified in his opening statement, he noted the

pluses. There were no crowds outside the buildings. He felt the faculty were more than able this year to communicate with the students; that the cafeteria had been neutralized; the faculty was better organized; that there were no students chanting and roaming, as there were last year, throughout the building; that they have in fact elected multi-ethnic student councils; and there in fact has been an improvement, in that the white students, at least this year, have elected a caucus.

He feels he has better records this year, and therefore that he is better able to implement due process. He feels [43] the aides are more helpful, and he feels that the Court's order has helped him in controlling the presence of any outside elements. Nonetheless, he was candid about the fact that the faculty morale has deteriorated, that the faculty feels under storm, as he put it, by numerous outside forces.

However, he felt that the University of Massachusetts programs were helping. He cited the Federal Reserve Bank's efforts in South Boston. In fact, I think the evidence is quite abundant that the School Department as a whole and Dr. Reid in particular made a profound effort over the summer to open South Boston High School with a minimal amount of tension and violence. I can cite his bulletins, Superintendent's circulars, his daily conferences with Mr. McDonough.

I think it is fairly well known that Dr. Reid is a very candid and honest man. He might not put everything in writing, but that does not mean he is not concerned.

The Court inquired as to what efforts have been made to insulate the school from disruptive outside agitation. Well, agitation does not have to come only from the South Boston community. Again, what has the evidence shown? Dr. Reid has candidly stated that there are incidents, that there are

racial tensions in the school, and that if he speaks to a student right afterwards, he has confidence in that student's version, but as peers, parents, and community groups become involved, the sharp edge of truth is lost for what the student [44] initially had to say.

Now what was the testimony of Mr. Cunningham? My memory is that the last six weeks have been disruptive, and that since October 6th, there has been heavy black community involvement, just as there was white community involvement before the Faith incident, and what was Mr. Cunningham's conclusion? That the community should stay out of the school.

The evidence has to be viewed realistically, your Honor, and what do we see before us? We see a well-planned but ill-conceived and founded effort to close a high school in a community that has come to symbolize resistance to the Court's order.

The Court: When you speak about effort, to whom do you attribute the effort? Are you talking about the blacks or the whites or both?

Mr. Tierney: I attribute the effort, your Honor, and I think the evidence will bear this out, to a core group of students, black students within the high school, that have participated in a well-coordinated effort by certain leaders of the black community, assisted by the attorneys for the plaintiffs, in an attempt to close down South Boston High School. I believe the evidence is clear with respect to the preparation of the affidavits.

The Court: Do you think that the effort to close the school is on account of what happened, or do you think the [45] effort to close the school is independent of what happened?

Mr. Tierney: I don't understand your Honor's question.

The Court: Well, the plaintiffs' spokesman is Mr. Van Loon. He said the school should be closed because of what happened to the blacks. I take it your view is that what plaintiffs allege happened did not occur, and that the effort to close the school is something that was preconceived independently of these racial incidents.

Mr. Tierney: Yes, sir. I thing that would be a fair characterization. I don't think— I am certain there are racial incidents. Certainly there is racial tension. We would have to be extremely naive to deny that. But the plaintiffs' version of those racial incidents is open to doubt, I submit.

I mentioned to your Honor during the course of cross-examination that credibility is a very fundamental issue here. There are always two sides to a story. My reference to Dr. Reid's statement about a student's version was meant to illustrate the fact that perhaps the picture as painted in the affidavits is not quite as glum as the picture initially presented to Dr. Reid in his office. It is only once the students are out into their community, and they are upset, of course they are upset, black and white students, both of them, but when the black students have come to their community, I submit their concerns have been magnified and [46] blown out of proportion.

• • •

DECISION AND ORDER FOR A DECREE, JUSTICE QUIRICO,

S.J.C., MARCH 22, 1975

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPREME JUDICIAL COURT

No. 73-190 Equity

BOARD OF EDUCATION OF THE COMMONWEALTH OF MASSACHUSETTS

v.

SCHOOL COMMITTEE OF THE CITY OF BOSTON

Decision and Order For a Decree

This court has before it once again the continuing dispute between the Board of Education of the Commonwealth of Massachusetts (the Board) and the School Committee of the City of Boston (the Committee) over the requirements of the "racial imbalance law" (G.L. c. 71, §§ 37 C and 37 D, inserted by St. 1965, c. 641) in relation to the public schools of the City of Boston. In this "Petition for Further Relief by Enforcement of Administrative Orders" the Board seeks a decree ordering the Committee to comply with "all aspects of . . . [its orders] dated June 25, 1973, December 26, 1973, January 28, 1974 and March 4, 1974 with which . . . [the Committee has] not yet complied."

The last three orders cited in the Board's petition, as well as the Board's order of March 19, 1974 which is considered below, was adopted by the Board to aid the implementation of the "Short Term Racial Balance Plan" for the Boston public schools (the Plan); the Plan was adopted by the Board by its order of June 25, 1973 and is intended to be in effect by September 1974. In *School Committee of Boston* v. *Board of Education,* Mass.,[a] decided by this court on October 29, 1973, we held the Plan to be a valid exercise

---

[a] Mass. Adv. Sh. (1973) 1315, 1326-1327.

of the Board's statutory authority under G.L. c. 15, §§ 1I - 1K, inserted by St. 1965, c. 641. We now hold that the implementing orders which are the subject of this proceeding also constitute a proper exercise of such authority and are themselves valid. The Board has previously sought decrees from this Court for the enforcement of some of these orders. Its last previous petition was filed on January 4, 1974 and heard by a single justice of this Court on January 9 and 16, 1974. On the latter date the court entered an Order in which it (1) found that the Committee had not complied with certain portions of the Board's order of December 26, 1973 and (2) ordered the Committtee to comply on or before January 21, 1974 "in all respects with that portion of the Board's Order of December 26, 1973 . . . with respect to what the Order required . . . [the Committee] to do and accomplish on or before January 15, 1974." We summarize relevant developments occurring subsequent to the entry of this Order afer first reviewing the contents of the Board's order of December 26.

Such order contained a detailed "implementation timetable" which required the Committee to submit to the Board certain described reports and information and to accomplish certain other steps on or before a series of dates specifically set forth therein. The first of these dates was January 15, 1974, and, as noted, was the subject of the Court's order of January 16, 1974. The subsequent dates in the timetable were February 15, April 1, April 15, and May 15, 1974. A later order of the Board dated March 4, 1974, modified the dates for certain of the submissions required to be made by the Committee from April 1 and April 15, 1974, to May 1 and May 15, 1974 respectively. That portion of the December 26 order setting forth the implementation timetable is incorporated herein and a copy thereof is attached as "Appendix A;" that portion of the March 4 order permitting certain modifications to the

timetable is incorporated herein and a copy thereof is attached as "Appendix B."

On January 21, 1974, the Committee submitted to the Board a document entitled "Response to the December 26, 1973, Order of the Massachusetts Board of Education;" on January 28, 1974, the Board issued an order which found in part that the modifications to the Plan proposed by the Committee in its January 21 submission lacked sufficient detail, and ordered the Committee to submit further details of such proposed modifications by February 15, 1974. On February 15 the Committee submitted to the Board a document entitled, "February 15, 1974 Response of the Boston School Committee to Board of Education Order of December 26, 1973;" on March 4, 1974, the Board entered another order which found in part that the Committee, by its February 15 submission, had still not complied with those aspects of the Board's previous orders relating to certain proposed modifications of the Plan, and ordered the Committee to submit "the required, detailed proposed modification[s]" by March 11, 1974. On March 11, the Committee submitted to the Board a document entitled "Response of the Boston School Committee to the Board of Education Order of March 4, 1974;" on March 19, 1974, the Board issued an order which again found that the Committee had not complied with certain aspects of the Board's previous orders, and ordered the Committee to submit certain information by March 25, 1974.

On March 6, 1974, prior to the last two interchanges between the Committee and the Board described above, the Board filed the present petition with this Court. In it the Board reviewed the proceedings through the issuance of its March 4 order, and alleged on information and belief that the Committee would not fully comply "with the remaining dates in the implementation timetable" and would "attempt to prevent implementation of the racial balance

plan in Boston by September of 1974'' unless ordered by this court to do so. It then prayed for a decree for the enforcement of its orders, as described above.

A hearing on this petition was held before a single justice of this court on March 20, 1974. At the hearing counsel for the Board moved to amend its petition by adding thereto certain paragraphs which described the March 11 submission of the Committee to the Board and the March 19 Board order. The motion was allowed without objection by counsel for the Committee. The Board's counsel also entered in open court an oral waiver of paragraphs 23 thru 25 and prayer 9 in the petition relating to weekly meetings between the staffs of the two parties.

As stated to counsel for both parties at the hearing, it is the court'ss opinion that the Board's present petition raises only two issues for our consideration: (1) whether the Committee has complied with the Orders of this court and with those portions of the Board's prior orders requiring the Committee to do and accomplish certain tasks by specific dates already passed; and (2) whether, if the Committee has not so complied, the Board is entitled to the entry of a decree ordering the Committee to comply with those portions of the Board's prior orders requiring the Committee to do and accomplish certain other tasks by specific dates still in the future. We consider each issue separately.

1. As described in the court's Order of January 16, the Board's December 26 order required the Committee to submit by January 15 proposed modifications to the Plan which would identify alternative facilities to replace the unusable Dorchester High School Annex and Mary Hemenway School building and would provide for a balanced enrollment plan for Districts 12 and 14, its proposals to achieve ''at least as much racial balancing, if implemented, as the Plan,'' but not to ''affect the basic structure of the

Plan;'' this Court found that the Committee's submissions of January 15 did not comply with these portions of the Board's order. In each of its subsequent orders the Board has found that each of the Committee's following submissions has also failed to comply with the requirements of its December 26 order and has ordered further detailed proposed modifications. Upon examination of the Committee's submissions of January 21, February 15, and Mach 11, 1974, we find and rule as follows.

With respect to the issue of the Dorchester High School Annex, we find that the Committee, after identifying several alternative options for a replacement facility in its January 21 submission, did not thereafter make any choice between them, nor did it even address the issue in its subsequent submissions of February 15 and March 11; the programmatic approaches'' suggested in the last submission do not satisfy the Board's order that the Committee identify and designate a building to replace the Dorchester Annex. We therefore find that the Committee has not fully complied with this aspect of the Board's order of December 26, 1973 nor with its subsequent orders of January 28 and March 4, 1974.

With respect to the issues of the Mary Hemenway school building and Districts 12 and 14, we find that the Committee's submission of February 15, 1974 contains a ''detailed proposed modification'' to the Plan, but that the Board, in its orders of March 4 and March 19, 1974, has stated that the Committee's proposal does not provide as much racial balance as would the Plan and that it therefore fails to comply with its orders. The Court is unable to determine on the record before it whether the Committee has or has not complied with the Board's orders. However, our inability to do so is of no present importance, because the Board's order of March 19, 1974 includes its own proposed modification of the plan with respect to the Mary Hemenway and Districts 12 and 14 issues, and the Board

states therein that "[t]he Committee may either approve and endorse this modification or propose a different modification in keeping with past Board Orders, on or before March 25, 1974." This order supplements its previous orders relating to the same issues, and is binding on the Committee.

2. In relation to the Board's prayers for a decree to enforce those portions of its orders which require the Committee to make submissions and to take other actions by certain dates in the future, we note the following.

We have found above that as of March 20, 1974, the date of the hearing on this most recent petition, the Committee had not yet fully complied with this court's Order of January 16, 1974 although full compliance was ordered by January 21, two months before the hearing date. We have also found that the Committee had failed to fully comply with repeated orders of the Board dating at least from December 26, 1973, almost three months before the hearing date. In addition, the documents submitted by the Committee to the Board on January 15, January 21, February 15, and March 11, 1974, in response to the Board's orders, manifest a continued attempt to delay implementation of the Plan. The contents of the Committee's submission of January 15, 1974 are fully described in the Court's Order of January 16; the Committee's submission of January 21, 1974 began with a section entitled "Need for New Data" which repeated the Committee's frequent assertion that it could not properly propose modifications to the Plan until the current "geocoded data" were available; the Committee's submission of February 15, 1974 begins by setting forth a "Counter Proposal" which suggests delaying any implementation of a racial balance plan for Boston until September, 1975; and its submission of March 11, 1974 begins with an expanded and somewhat revised version of this "Counter Proposal" which again suggests delaying implementation until September 1975 in all but the Boston High Schools.

Based on these considerations, the Court holds that the Committee's past conduct in relation to orders of the Board and of the Court gives reason to doubt whether the Committee, unless expressly ordered by the Court to do so, will seasonably comply with the several remaining portions of the Board's order for implementation of the Board ordered racial balance plan in Boston by September 1974. It is therefore hereby ORDERED as follows:

(1) That an Interlocutory Decree be entered in the form which is attached hereto and made a part hereof; and

(2) That the hearing on the pending petition be and it hereby is continued to Tuesday, April 2, 1974, at 4:00 P.M., for the following purposes:

(a) To determine whether the Committee has complied with the Interlocutory Decree being entered by the Court on this date; and, if it has not, what action, if any, should be taken by the Court thereon;

(b) To determine whether the Committee has complied with those portions of the Board's order of December 26, 1973, as modified by its order of March 4, 1974, which require performance or compliance through April 1, 1974; and, if it has not, what action, if any, should be taken by the Court thereon;

(c) To determine whether the Court should enter any further order or decree requiring compliance by the Respondents with those portions of the Board's order of December 26, 1973, as modified which require performance or compliance on any date or dates after April 1, 1974; and

(d) To hear the parties on any other issues which may then require the attention of the Court in these proceedings.

March 22, 1974 .

s/FRANCIS J. QUIRICO
Associate Justice,
Supreme Judicial Court

PORTION OF EXHIBIT 32, DISTRICT COURT HEARING
ON SOUTH BOSTON HIGH SCHOOL

REPORT OF SCHOOL INCIDENTS

(WITNESSES)

SCHOOL South Boston High School

DATE OF REPORT 11/14/75

This form is to be used to report all incidents of an unusual nature and those requiring disciplinary action in school buildings, on school grounds and in outside locations where school sponsored activities are scheduled.

NAME OF PERSON REPORTING THE INCIDENT Ms. Krieger
POSITIONS Teacher in Algebra I Rm. 202

DESCRIPTION OF INCIDENT:
(*Include times, dates, place, names, ages, sex and race*)

202 3rd Period Approximately 9:50 A.M.
William Duwars came about 5 min. late into class (about 9:35). He sat quietly in class, then all of a sudden at 9:50 A.M. I saw William Duwars approach Calvin Greene with a chair in his hand & hit him over the head with it, twice. My back had been turned while writing on the board so I did not see him until he was already at Calvin's back. He sneaked up on him. I screamed "No! No!" & yelled for someone to get a policeman. Duwars backed off & picked up another chair. Calvin ran from the room holding his head. A policeman came in & took William Duwars away. Dr. Reid came right away & Tom Cahill said "Why

wasn't anything done when a nigger hit me with a chair!" Dr. Reid took him to the office also.

As far as I saw Duwars' attack on Greene was completely unprovoked.

MRS. KRIEGER

ACTION TAKEN:

.....

BUILDING ADMINISTRATOR

Prepare in triplicate:
2 copies to Area Superintendent .....
1 copy retained by office .....

INTERIM FORM 9/5/75

PORTION OF EXHIBIT 33, DISTRICT COURT HEARING
ON SOUTH BOSTON HIGH SCHOOL

NAME C. Moore, Teacher
ADDRESS 174 St. Botolph St., Boston
D.o.B. 7-7-47 AGE 28
STUDENT'S NAME OR LEGAL GUARDIAN .....
TIME OF INCIDENT 8:10 A.M. DATE 10-17-75
PLACE OF INCIDENT HR 115

DESCRIPTION OF INCIDENT PER INDIVIDUAL:

At 8:10 A.M. approx. twenty 20 white male students entered my homeroom, #115 and physically attacked three 3 black male students — Eddie Harris, Alvin McKinnon, and Dereck Polk. Of the 20 white males, I knew only two 2 *Robert Mulvaney* and *Robert Pearson.* The students entered and without words began striking McKinnon, then the wave of white students joined the fighting. The students were overturning chairs and tables as they fell to the floor

fighting. The fight was broken up by aides and policemen. Aside from the 3 blacks the only other person in HR 115 prior to the fight was Rafael Calderon.

C. Moore

Routing

Interviewed by ..... Nurse .....
Individual Folder ..... Incident Folder .....
Home Phone Called .....
Desk Card .....
Case No. .....
Suspension ..... Date ..... Page No. .....

Office Use Only 2 Copies

Excerpt From District Court Order on Motion For Relief Concerning Security, December 12, 1974

United States District Court
District of Massachusetts

Civil Action No. 72-911-G

Tallulah Morgan Et Al.,
plaintiffs,
v.
John J. Kerrigan Et Al.,
defendants.

ORDER ON MOTION FOR RELIEF CONCERNING SECURITY
December 17, 1974

Garrity, J.

After hearing it is ORDERED that:

• • •

4. The defendants school committee and superintendent shall promulgate as part of the code of discipline and enforce with appropriate sanctions rules prohibiting any student while in school or on school property from communicating racial slurs or epithets, e.g., "nigger" and "white trash", which would by their very utterance inflict injury or tend to incite an immediate breach of the peace or would provoke the average student to retaliation. See *Chaplinsky* v. *New Hampshire*, 1942, 315 U.S. 568.

• • •
